Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

NARRAGANSETT INDIAN TRIBE,
Petitioner,

v.

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS, *ET AL.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 21, 2006

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QUESTION PRESENTED

Whether, in direct conflict with precedents of this Court, other federal courts of appeals, and state supreme courts, the First Circuit erred in holding in a divided en banc opinion that a federal statute's conferral of "jurisdiction" over Indian lands, but not over the Tribe as sovereign, impliedly abrogates the tribal government's sovereign immunity and thus empowers a state judge to authorize state police to execute a search warrant against the Tribe, seize funds and property belonging to the tribal government, and arrest tribal officials acting in their official capacities.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all the parties appearing here and before the United States Court of Appeals for the First Circuit.

The petitioner here and plaintiff-appellant below is the Narragansett Indian Tribe, a federally recognized Indian Tribe.

The respondents here and defendants-appellees below are the State of Rhode Island and Providence Plantations; Donald L. Carcieri, in his official capacity as the Governor of Rhode Island; Patrick C. Lynch, in his official capacity as the Attorney General of Rhode Island; Colonel Steven M. Pare, in his official capacity as Superintendent of the Rhode Island State Police; Justices of the Rhode Island District and Superior Courts; the Town of Charlestown, Rhode Island; and the Charlestown Police Department.

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OPINIONS BELOW

The divided en banc opinion of the United States Court of Appeals for the First Circuit is reported at 449 F.3d 16 and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-53a. The First Circuit's panel opinion is reported at 407 F.3d 450 and is reprinted at Pet. App. 56a-84a. The District Court's opinion is reported at 296 F. Supp. 2d 153 and is reprinted at Pet. App. 85a-126a.

JURISDICTION

The Court of Appeals entered its judgment on May 24, 2006. Justice Souter extended the time to file this petition to September 21, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the Rhode Island Indian Claims Settlement Act (the "Settlement Act"), Pub. L. No. 95-395, 92 Stat. 813 (1978), *codified as amended at* 25 U.S.C. §§ 1701-1716. Section 9 of the Act provides that the Narragansett Indian Tribe's "settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708(a). The entire Settlement Act is reproduced at Pet. App. 127a-138a.

STATEMENT OF THE CASE

The decision below arises out of the State of Rhode Island's unprecedented effort to resolve a tax dispute with the Narragansett Indian Tribe by executing a state search warrant to seize tribal property and funds from the Tribe's reservation and to arrest tribal leaders.

The Tribe and the State disagreed about whether a state tax applied to cigarettes sold by the tribal government at a tribal smoke shop on the Tribe's reservation. While other States and Tribes have resolved such disputes by adjudication or negotiated agreement, Rhode Island "chose the

confrontational alternative of a Rambo-like raid," Pet. App. 52a, sending 30 state troopers with a canine unit onto the Narragansetts' reservation to enforce a search warrant issued by a Rhode Island state court. In the ensuing altercation, the state troopers arrested eight individuals – including the Tribe's Chief Sachem, three Tribal Council members, and a federally deputized tribal law-enforcement officer – and confiscated property, documents, and funds belonging to the tribal government.

A panel of the First Circuit held unanimously that the Tribe's sovereign immunity and right to self-government precluded execution of the state court's search warrant against the Tribe and tribal government property. In a 4-to-2 decision, the First Circuit en banc reversed course, upholding the state seizure of tribal government property from the reservation. That en banc decision represents a sharp break with decisions of this Court and other courts of appeals construing federal statutory language that extends state civil and criminal laws and jurisdiction over Indian lands. This Court has definitively construed that language, which appears in numerous Indian-related statutes, as preserving, not eliminating, tribal sovereign immunity and thus as not authorizing the exercise of state jurisdiction over the Tribe itself. The First Circuit's unprecedented construction of ubiquitous statutory language will have an immediate and substantial destabilizing effect on tribal-state relations, inviting armed confrontation instead of negotiated agreements or orderly litigation to resolve jurisdictional disputes. Accordingly, the decision below warrants this Court's immediate review.

A. Factual Background

1. The Narragansett Indians descend from the original inhabitants of what is now Rhode Island and occupied an

aboriginal territory that included the lands near what is now Charlestown, Rhode Island. Pet. App. 3a, 93a & n.6.[1]

In 1880, after seeking for decades to force the Narragansetts to assimilate, the State passed An Act to Abolish the Tribal Authority and Tribal Relations of the Narragansett Tribe of Indians, R.I. Acts 1879-1880, c. 800. The Narragansetts, by then destitute, were forced to sell nearly all their remaining lands to the State for a fraction of their market value. Pet. App. 3a, 43a n.16, 93a. That sale violated the Nonintercourse Act, 25 U.S.C. § 177, because the State failed to secure the required federal approval. Pet. App. 3a, 43a n.16, 93a-94a & n.7.

Although nearly landless and officially "detribalized" by the State of Rhode Island, the Narragansetts maintained their traditional tribal government, with Sachems, Medicine Men and Women, a Tribal Council, Sub-Chiefs, Tribal Prophets, a War Chief, and Clan Mothers. And they began a century-long effort – ultimately successful – to regain part of their tribal lands.[2]

2. In 1975, the Tribe filed two suits in the U.S. District Court for the District of Rhode Island seeking the return of approximately 3,200 acres of land representing a small portion of the Tribe's aboriginal territory. Pet. App. 3a, 58a, 93a; *see also Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp.*, 418 F. Supp. 798 (D.R.I. 1976). Because the 1880 conveyance was void and the Indians' aboriginal title had never been lawfully extinguished, the Tribe held a claim of title superior to that of any landowner whose chain of title depended on the 1880 sale. Pet. App. 3a, 94a; *cf. Oneida Indian Nation of N.Y. v.*

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[1] *See* WILLIAM G. MCLOUGHLIN, RHODE ISLAND 3-49, 220-22 (1978).

[2] *See* Bureau of Indian Affairs, U.S. Dep't of the Interior, Memorandum re: Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgement of the Narragansett Indian Tribe of Rhode Island Pursuant to 25 C.F.R. § 83, at 4-18 (July 29, 1982).

County of Oneida, 414 U.S. 661 (1974). These lawsuits clouded the titles of hundreds of Charlestown landowners and depressed property values. Pet. App. 28a, 127a.

In February 1978, the State, the Town of Charlestown, the affected landowners, and the Tribe executed a "Settlement Agreement" (reproduced at Pet. App. 139a-144a), and both Congress and the Rhode Island General Assembly subsequently enacted the necessary enabling legislation. *See* Rhode Island Indian Claims Settlement Act (the "Settlement Act"), Pub. L. No. 95-395, 92 Stat. 813 (1978), *codified as amended at* 25 U.S.C. §§ 1701-1716, Pet. App. 127a-138a; Narragansett Indian Land Management Corporation Act, Pub. L. No. 1979, ch. 116, 1979 R.I. Pub. Laws 402, *codified as amended at* R.I. Gen. Laws §§ 37-18-1 to 37-18-15.

The principal object of the settlement was to resolve the Tribe's land claims and thereby clear title. Pet. App. 34a n.12. The settlement established 1,800 acres in and around Charlestown as the Tribe's "settlement lands." *Id.* at 4a, 58a-59a, 87a n.2, 139a-140a. It provided that the State would donate 900 acres (mostly swampland) to the Tribe and that another 900 acres would be purchased from private landowners with $3.5 million in federal funds. *Id.* at 95a, 129a, 135a, 139a-140a. In exchange, the Tribe relinquished its land claims and dismissed its lawsuits. *Id.* at 127a-144a.

The settlement also gave the State jurisdiction over the settlement lands. *Id.* at 135a-136a, 142a. In so doing, both the Settlement Act and the Settlement Agreement used language that this Court had construed as preserving the Tribe's right to self-government and its sovereign immunity from state judicial proceedings. *Id.* at 31a-34a, 135a, 142a. The Settlement Act thus provides that "the settlement lands shall be *subject to the civil and criminal laws and jurisdiction* of the State of Rhode Island." *Id.* at 135a (25 U.S.C. § 1708(a)) (emphasis added). And the Settlement

Agreement states that "all laws of the State of Rhode Island shall be *in full force and effect* on the Settlement Lands, including but not limited to state and local building, fire and safety codes." *Id.* at 142a (emphasis added).

These phrases echoed the virtually identical language in "Public Law 280," Pub. L. No. 83-280, §§ 2, 4, 67 Stat. 588, 588-90 (1953), *codified as amended at* 25 U.S.C. §§ 1321-1322, 28 U.S.C. § 1360, the landmark federal statute enacted in 1953 that authorizes certain States to exercise civil and criminal jurisdiction over specified Indian lands "to the same extent that such State has jurisdiction" elsewhere within the State, and provides that state civil and criminal laws "shall have the same force and effect" in Indian country as elsewhere in the State. 25 U.S.C. §§ 1321(a), 1322(a); 28 U.S.C. § 1360(a); *see* Pet. App. 31a-36a.

This Court had definitively interpreted Public Law 280 in 1976 – just two years before the Tribe executed the Settlement Agreement and Congress enacted the Settlement Act. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Court held that Public Law 280's grant of civil jurisdiction is limited to "jurisdiction over private civil litigation involving reservation Indians in state court," and that "there is notably absent [from Public Law 280] any conferral of state jurisdiction over the tribes themselves." *Id.* at 385, 389. The next year, in *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977), the Court reiterated the long-standing principle that "[a]bsent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe," and it refused to permit state court jurisdiction over a Tribe even in a case properly before the state court as to individual tribal members. *Id.* at 172-73. Soon thereafter, this Court reaffirmed the principle that a waiver of tribal sovereign immunity "'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citations omitted).

Neither the Settlement Act nor the Settlement Agreement, nor their legislative or negotiating histories, contained any suggestion of an intent to depart from this Court's teachings, nor did they even hint that the settlement would abrogate or waive the Tribe's immunity so as to allow a state court to exercise jurisdiction over the Tribe itself. *See id.* at 34a & n.13, 47a, 127a-144a.

3. Following the Settlement Act, the United States formally recognized the Tribe and took the settlement lands into trust for the Tribe, entitling the Tribe to the same "immunities and privileges" as other federally recognized Tribes and recognizing it as a self-governing Tribe with a duly elected tribal government. *See* 48 Fed. Reg. 6177-78 (1983); *see also* 25 C.F.R. § 83.2. Today, the Tribe has 2,400 enrolled members, most of whom live on or near the settlement lands. An elected nine-member Tribal Council serves as the Tribe's governing body, a Chief Sachem heads the Tribe's executive branch, and a non-elective Medicine Man serves as a spiritual advisor. The Tribe provides a full battery of local governmental services, including law enforcement by the Narragansett Tribal Police Department and medical care by the Narragansett Indian Health Center. *See generally* TILLER'S GUIDE TO INDIAN COUNTRY 911-12 (Veronica E. Velarde Tiller ed., 2005 ed.).

4. While many of its governmental programs depend at least in part on federal funding, the Tribe has sought to build its own revenue base and to become increasingly self-sufficient. Consistent with this effort, in 2003 the Narragansett tribal government passed a resolution establishing a tribal smoke shop – wholly owned and operated by the Tribe and situated on tribal lands – to sell cigarettes to members and nonmembers alike. Pet. App. 145a-146a, 156a.

After consulting with outside counsel, the tribal government concluded that the state cigarette tax did not

apply to cigarettes sold at the Tribe's smoke shop because the tax's legal incidence falls on the Tribe and is thus preempted by federal law. *Id.* at 60a-61a, 64a-68a. Although the state statute "conclusively presume[s]" that the cigarette tax is "a direct tax on the retail consumer," R.I. Gen. Laws § 44-20-53, long-standing Rhode Island precedent established that the legal incidence falls instead on the distributor or dealer (here, the Tribe). *See Daniels Tobacco Co. v. Norberg*, 335 A.2d 636, 638 (R.I. 1975). This Court has previously deemed conclusive a state supreme court's "own definitive determination as to [a state tax's] operating incidence." *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975).

5. The State adopted a contrary view of the tax's legal incidence, and it set out to enforce the tax against the Tribe. Pet. App. 61a. Although the Governor and the Attorney General had known for weeks that the Tribe was planning to sell cigarettes at its smoke shop without collecting the state tax, *id.* at 40a, the State chose not to resolve the dispute by any of the peaceable means at its disposal. *Cf. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) (outlining alternatives). Instead, the State brought to bear the full brunt of its criminal law-enforcement apparatus against the Tribe.[3]

6. On Saturday July 12, 2003, the day of the smoke shop's opening, a state-court judge issued a search warrant authorizing the state police to search the shop and to seize not only the Tribe's cigarettes, but also any "United States Currency, paperwork, items, computers [and] documents showing ownership or control of the premises." Pet. App. 151a-152a. The warrant listed as the "[n]ame of the store owner, or keeper," Matthew Thomas, the Tribe's Chief Sachem. *Id.* at 151a.

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[3] Under Rhode Island law, selling untaxed cigarettes is a misdemeanor; the State is entitled to seize (and resell) such cigarettes as contraband. *See* R.I. Gen. Laws §§ 44-20-33 to 44-20-38; Pet. App. 146a.

On Monday afternoon, July 14, 2003, the state police executed the state warrant. *Id.* at 44a. No fewer than 30 state troopers marched in formation toward the smoke shop, where they were met by tribal policemen and officeholders vowing to resist what they saw as an entirely illegitimate assault on the Tribe's sovereignty. *Id.*

The result was a violent confrontation between the state troopers and the tribal officers and members that was captured on videotape and received widespread media coverage. By the end of the raid, the state police had arrested eight Narragansett tribal members – including Chief Sachem Thomas, three Tribal Councilmen, and a federally deputized tribal law-enforcement officer – and eight people required hospitalization for injuries. *Id.* at 147a. State police also confiscated the Tribe's cigarettes, as well as $900 from the shop's cash register and various tribal documents. *Id.* at 61a.[4] State criminal proceedings arising from the raid have been stayed pending resolution of this case.

B. District Court Proceedings

Shortly after the raid, the Tribe sued in the U.S. District Court for the District of Rhode Island, seeking a declaration first, that the legal incidence of the Rhode Island cigarette tax fell on the Tribe and that application of the tax to the Tribe

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[4] Members of Congress condemned the State's actions. Senator Ben Nighthorse Campbell, Chairman of the Senate Committee on Indian Affairs, stated that "[a]nyone who witnessed the episode in videotape – as I have – surely was sickened and profoundly disappointed at the tactics used by the state in its dispute with the tribe regarding sales of tobacco on the tribe's lands." Letter from Sen. Campbell to Att'y Gen. John Ashcroft (July 23, 2003); *see also* Letter from Richard W. Pombo, Chairman of the House Committee on Resources, to Att'y Gen. Ashcroft (July 17, 2003) (noting that the place to resolve the "serious, complex, and legitimate legal questions" implicated by the tax dispute "is in a court of law, not in an aggressive raid that risks violent confrontation on tribal land where tribal members, state and tribal law enforcement officers, and innocent bystanders are all put needlessly in harm's way").

was thus foreclosed by *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458-59 (1995), and second, that the Tribe's sovereign immunity precluded the State from executing a search warrant to seize tribal property on tribal lands. Pet. App. 89a. After submitting the case on stipulated facts, *id.* at 145a-148a, the parties cross-moved for summary judgment. *Id.* at 62a, 86a, 90a.

The District Court granted summary judgment to the State. *Id.* at 86a, 126a. Although recognizing that the Tribe had a good-faith argument based on the Rhode Island Supreme Court's decision in *Daniels*, the District Court held as a matter of federal preemption law that the legal incidence of the tax fell on the non-Indian consumer rather than on the Tribe. *Id.* at 98a-108a. The District Court then concluded that the Tribe's sovereign immunity did not bar the State from enforcing the cigarette tax, even against the Tribe itself. *Id.* at 108a-125a. In particular, the court held that the Settlement Act and the Settlement Agreement supplied authority for the state troopers to execute the state court's warrant to seize tribal property on tribal lands. *Id.* at 125a-126a.

C. First Circuit Proceedings

On appeal, a panel of the First Circuit affirmed in part and reversed in part. Pet. App. 84a. The panel accepted the District Court's determination – as does the Tribe for purposes of this petition – that the legal incidence of the tax falls on the consumer and that the Tribe therefore must comply with the State's tax scheme when selling cigarettes to non-Indian purchasers (though not to tribal members). *Id.* at 64a-72a. The panel disagreed, however, that the State could enforce the tax scheme by executing a search warrant against the Tribe. *Id.* at 72a-84a. In the panel's view, neither the Settlement Act nor the Settlement Agreement abrogated or waived the Tribe's sovereign immunity. *Id.* at 73a-75a.

The panel relied on this Court's opinion in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), which stated unambiguously that even where a State "may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid taxes. . . . There is a difference between the right to demand compliance with state laws and the means available to enforce them." *Id.* at 755, *quoted in* Pet. App. 83a. The panel thus held that the tribal government's sovereign immunity barred Rhode Island from enforcing "the criminal provisions of its cigarette tax laws by executing a search warrant against the Tribal government's Smoke Shop, forcibly entering the Shop and seizing the Tribe's stock of [untaxed] cigarettes, and arresting tribal officials who were acting in their official capacity." Pet. App. 84a.

In response to the State's petition for rehearing, the First Circuit withdrew parts of the panel opinion and voted to rehear en banc "whether, to what extent, and in what manner Rhode Island may enforce its civil and criminal laws with respect to the operation of the Smoke Shop by the Narragansett Indian Tribe." *Id.* at 54a. In a 4-to-2 decision, the en banc court disagreed with the panel's conclusion on the enforcement questions and therefore affirmed the District Court's judgment in favor of the State. *Id.* at 2a, 26a.

The en banc majority focused on the language in the Settlement Act and the Settlement Agreement providing, respectively, that the settlement lands are "subject to the civil and criminal laws and jurisdiction of the State of Rhode Island," and that "all laws of the State of Rhode Island shall be in full force and effect on the settlement lands." In the majority's view, that language eliminated the Tribe's immunity, subjecting the Tribe to state-court jurisdiction. Pet. App. 9a-10a, 15a-18a. The majority acknowledged that this Court had squarely held – in *Bryan*, 426 U.S. at 389; *Puyallup Tribe*, 433 U.S. at 170-73; and *Three Affiliated*

Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 890-92 (1986) – that virtually identical language in Public Law 280 was *insufficient* to abrogate tribal sovereign immunity and did not confer jurisdiction over the Tribe. Pet. App. 19a-23a, 21a n.7. The majority believed, however, that "the historical context and purpose of Public Law 280 are so completely different from those of the Settlement Act that, despite some linguistic coincidences, the [Supreme] Court's interpretation of that law has no bearing on the issues before us." *Id.* at 19a.

The majority also rejected the argument in the panel opinion and the dissent that a sovereign such as the Tribe might be subject to state laws but still retain its immunity from state judicial proceedings to enforce those laws. Indeed, the majority expressly overruled First Circuit precedent that had – consistent with case law from this Court and other courts of appeals – adopted that precise distinction.

Judge Lipez and Judge Torruella dissented. In Judge Lipez's view, the majority's conclusion that the operative language of the Act and the Agreement eliminated tribal immunity from state-court jurisdiction was directly at odds with unambiguous precedent from this Court. *Id.* at 30a-36a. Judge Lipez underscored that "Congress has used this language for half a century to confer state jurisdiction over individual Indians on tribal lands" and that, both before and since the Narragansetts' 1978 settlement, "the Supreme Court consistently has held that such language – however categorically stated – does not waive or abrogate tribal sovereign immunity." *Id.* at 31a.

Judge Torruella joined Judge Lipez's dissent and also wrote separately to emphasize that the majority's approach "ignores Supreme Court precedent – some of which is 150 years old," *id.* at 42a – holding that "a waiver or abrogation of sovereign immunity must be unequivocal and explicit." *Id.* (citing *Santa Clara Pueblo*, 436 U.S. at 58).

REASONS FOR GRANTING THE PETITION

For more than half a century in a variety of settings, Congress has used virtually the same statutory language to confer state jurisdiction over civil and criminal matters on Indian lands. That language – allocating to a State civil or criminal "jurisdiction" and providing that state laws will have "force and effect" on the reservation – has been construed definitively by this Court to render state law generally applicable to tribal members on reservation lands but not to abrogate tribal sovereign immunity and thus not to subject the Tribe itself to state jurisdiction. In the splintered en banc decision below, a 4-to-2 majority of the First Circuit held that this same language when used by Congress and the parties in the Rhode Island Indian Claims Settlement Act and the Settlement Agreement impliedly subjected the Tribe in its sovereign capacity to state judicial process.

The decision below squarely conflicts with decisions of this Court, principally *Bryan v. Itasca County*, 426 U.S. 373 (1976), *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977), and *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1986). Those cases establish that when Congress confers "jurisdiction" and provides for state laws to have "force and effect" on Indian lands, it allows the State to exercise jurisdiction over tribal members and others on those lands – for example to criminally prosecute (and in the process serve search warrants upon) individual tribal members on those lands – but does not subject the Tribe itself to state judicial process. The decision below also conflicts with countless decisions of the federal courts of appeals and state appellate courts – including the highest courts of Alaska, Florida, Iowa, and Minnesota – holding that a congressional grant of jurisdiction to a State over Indian lands does *not* abrogate tribal sovereign immunity and therefore does not authorize state courts to exercise jurisdiction over an Indian Tribe.

Indeed, to conclude otherwise, the majority was forced to reject the well-settled distinction between whether a tribe is subject to state substantive law and whether that law may be enforced against the Tribe through state judicial process. In so doing, the majority created a direct conflict with this Court's decisions in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), and *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), and with decisions of the Second and Eleventh Circuits, holding that subjecting a Tribe to state or federal substantive law does not abrogate tribal sovereign immunity. That same principle is equally fundamental in this Court's jurisprudence outside of Indian law. A sovereign can be subject to the substantive laws of another sovereign while maintaining its immunity from suit. *See Board of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001); *cf. United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992).

Review by this Court is of the utmost importance. The Rhode Island Settlement Act is seminal legislation that served as the model for almost every other land-claims settlement act and for other similar legislation – nearly a dozen federal statutes in all. *See, e.g.*, 25 U.S.C. §§ 1300b-11, 1300f(c), 1300g-4(f), 1741, 1755, 1771g, 1772, 1773, 1775d(a). The decision below is thus of extraordinary importance throughout Indian country. That is particularly so given the breadth of the First Circuit's holding that the Settlement Act abrogated the tribal government's immunity from suit, subjecting the Tribe to the State's "entire armamentarium of legal means for redressing noncompliance." Pet. App. 18a. The First Circuit has thus placed at risk Tribes' control over a broad range of tribal programs and leaves the Narragansetts and other Tribes subordinate to the States. This unprecedented result denies Indian governments the dignity to which they are entitled "[a]s separate sovereigns pre-existing the Constitution,"

Santa Clara Pueblo, 436 U.S. at 56, "unduly intru[ding] on the Tribe's common law sovereign immunity, and thus on its ability to govern itself according to its own laws," *Three Affiliated Tribes*, 476 U.S. at 891. Sovereign immunity is a "necessary corollary to Indian sovereignty and self-governance," *id.* at 890, and is as essential to the dignity of Indian Tribes, as it is to the States. *Cf. Federal Maritime Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.").

Moreover, even as to the precise facts of this case – state enforcement of a search warrant issued by a state court against a tribal government – the issues presented are critically important in Indian country, as the First Circuit's decision threatens to transform the rules governing tribal-state relations in areas of mutual concern. This Court itself recognized the importance of these issues when it granted certiorari in *Inyo County v. Paiute Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701 (2003), a case that likewise involved a tribal challenge to a State's efforts to enforce a search warrant against a Tribe and tribal government property.

The decision below also is wrong. While Congress has the power to abrogate tribal sovereign immunity, an abrogation will be found only if Congress has "'unequivocally' express[ed] that purpose." *C&L Enters. Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting *Santa Clara Pueblo*, 436 U.S. at 58). Nothing in the Settlement Act purports to abrogate the Tribe's sovereign immunity.

Nor was the First Circuit correct in its apparent belief that its result was necessary to give effect to the state tax laws at issue here. To the contrary, this Court repeatedly has denied that States have any right to the most convenient method for

enforcing a tax directly against a Tribe, and it has instead enumerated alternative remedies that provide "a mutually satisfactory regime for the collection of this sort of tax." *Citizen Band Potawatomi*, 498 U.S. at 514.

In short, this Court has set out a clear formula for conferring state jurisdiction over tribal members on tribal lands without subjecting the Tribe itself to state control or abrogating tribal sovereign immunity, and Congress in the Settlement Act followed that formula to the letter. The First Circuit's unprecedented decision to reinterpret that formula is indefensible. Moreover, by giving States unchecked power over tribal governments, the decision eviscerates tribal sovereignty and encourages confrontation rather than negotiation or litigation as the mechanism for resolving good-faith disputes between States and Tribes. Review by this Court is thus urgently needed.

I. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS HOLDING THAT A CONGRESSIONAL GRANT OF CIVIL OR CRIMINAL "JURISDICTION" OVER INDIAN LANDS DOES NOT ABROGATE A TRIBE'S SOVEREIGN IMMUNITY.

The extent of state jurisdiction over Indians and Indian lands is an issue Congress has addressed frequently over the past 50 years. Broadly speaking, the issue has arisen in three contexts. *First*, under "Public Law 280," Congress in 1953 gave several States extensive civil and criminal jurisdiction over Indian lands, and other States later assumed jurisdiction as permitted in the statute. *Second*, Congress has passed legislation approving land-claims settlements that set aside certain lands for a Tribe and conferring state jurisdiction over that land in return for the Tribe's relinquishment of its land claims. *Third*, Congress has resolved claims for tribal recognition by providing a Tribe with federal recognition and a reservation and conferring some level of jurisdiction upon

the State. In all three settings, the congressional purpose of the jurisdictional provisions is the same: to grant jurisdiction over Indian lands that the State would otherwise lack.[5]

The language that Congress has used to grant jurisdiction in these contexts has been remarkably constant: The State is given civil or criminal "jurisdiction" over Indian land, and often Congress provides that state laws will have "force and effect" on that land. The Rhode Island Settlement Act – which was the first of the land-claims settlement acts – is typical of the later ones and tracks the language of Public Law 280: 25 U.S.C. § 1708(a) provides that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island," and the Settlement Agreement between the State and the Tribe provides that "all laws of the State of Rhode Island shall be in full force and effect on the Settlement Lands." Pet. App. 135a, 142a. The First Circuit's conclusion that this language abrogates tribal sovereign immunity and thus subjects the Tribe to state law conflicts directly with decisions of this Court, other federal courts of appeals, and state appellate courts.

A. The Decision Below Is at Odds with a Wealth of Decisions Construing Indistinguishable Language.

This Court has definitively construed the relevant statutory language in cases arising under Public Law 280, which grants certain States civil and criminal "jurisdiction" and provides that their laws will have the same "force and effect" on Indian lands as those laws have elsewhere. In

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[5] As this Court has often held, absent congressional authorization, States lack criminal jurisdiction over offenses committed by or against Indians on Indian lands, *see Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979); *Williams v. Lee*, 358 U.S. 217, 220 & n.5 (1959); *Williams v. United States*, 327 U.S. 711, 714 (1946), and generally lack civil jurisdiction over Indians on Indian lands, *see McClanahan v. Tax Comm'n of Arizona*, 411 U.S. 164, 171, 177-78 (1973); *Williams v. Lee*, 358 U.S. at 219-20.

Bryan v. Itasca County, a case decided just two years before Congress passed the Settlement Act, this Court expressly stated that Public Law 280's operative language did not confer state jurisdiction over Tribes themselves. *Bryan*, 426 U.S. at 389. Refusing to risk "the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations,'" the Court distinguished between jurisdiction over individual Indians on tribal lands and jurisdiction over the Tribe itself, concluding that "there is notably absent [in Public Law 280] any conferral of state jurisdiction over the tribes themselves." *Id.* at 388-89 (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)). *Bryan* contrasted Public Law 280 with other contemporaneously enacted statutes that had terminated the federal recognition of certain Tribes and in so doing had *expressly* extended state jurisdiction over the Tribes themselves, holding that these statutes demonstrated that if Congress had intended Public Law 280 to have such an effect "it would have expressly said so." *Id.* at 389-90.

The following year, in *Puyallup Tribe*, the Court considered whether a state-court action to enjoin violations of state law in connection with off-reservation fishing activities, "analogous to prosecution of individual Indians for crimes committed off reservation lands," could proceed against the Tribe as well as against individual tribal members. 433 U.S. at 171. The Court held that, "[a]bsent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over recognized Indian tribe," and that those portions of the state-court order that involved relief against the Tribe "must be vacated in order to honor the Tribe's valid claim of immunity." *Id.* at 172-73.

In *Three Affiliated Tribes*, the Court reaffirmed the core holding in *Bryan*, stating that "[w]e have never read Pub. L. 280 to constitute a waiver of tribal sovereign immunity, nor

found Pub. L. 280 to represent an abandonment of the federal interest in guarding Indian self-governance," confirming that "there is notably absent [in Public Law 280] any conferral of state jurisdiction over the tribes themselves." 476 U.S. at 892 (quoting *Bryan*, 426 U.S. at 389). Recognizing that tribal sovereign immunity is a "necessary corollary to Indian sovereignty and self-governance," the Court held that "in the absence of Federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." *Id.* at 890-91. The First Circuit's decision construing the indistinguishable language of the Settlement Act conflicts directly with these cases.

The decision likewise conflicts with the interpretation of this language given by every lower court to consider the question. For example, in *California ex rel. California Department of Fish & Game v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979), the Ninth Circuit held that Public Law 280's grant of criminal jurisdiction does not abrogate tribal immunity because "[n]either the express terms of [Public Law 280], nor the Congressional history of the statute, reveal any intention by Congress for it to serve as a waiver of a tribe's sovereign immunity." *Id.* at 1156 (footnote omitted). The highest courts in Alaska, Florida, Iowa, and Minnesota have all reached the same conclusion. *See Atkinson v. Haldane*, 569 P.2d 151, 167 (Alaska 1977); *Houghtaling v. Seminole Tribe of Fla.*, 611 So. 2d 1235, 1238-39 (Fla. 1993); *Gross v. Omaha Tribe of Neb.*, 601 N.W.2d 82, 83 (Iowa 1999); *Meier v. Sac & Fox Indian Tribe of Miss. in Iowa*, 476 N.W.2d 61, 63-64 (Iowa 1991); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 289 (Minn. 1996); *see also Long v. Chemehuevi Indian Reservation*, 115 Cal. App. 3d 853, 856-58 (1981).

The decision below likewise conflicts with state-court decisions construing legislation providing for federal recognition of a Tribe. In *Silva v. Ysleta del Sur Pueblo*, 28

S.W.3d 122 (Tex. App.-El Paso 2000), for example, the court rejected the argument that Congress had abrogated the Tribe's sovereign immunity by passing 25 U.S.C. § 1300g-4(f), which extends state civil and criminal jurisdiction "within the boundaries of such reservation as if such state had assumed such jurisdiction with the consent of the tribe under [Public Law 280]." 28 S.W.3d at 124-25 (internal quotation marks omitted) (citing *Bryan* and *Three Affiliated Tribes*); *see also Val/Del, Inc. v. Superior Court*, 703 P.2d 502, 507-08 (Ariz. Ct. App. 1985) (rejecting contention that grant of federal recognition to the Pascua Yaqui Tribe and extension of state jurisdiction over Pascua Yaqui lands in 25 U.S.C. § 1300f abrogated the Tribe's sovereign immunity).

Indeed, prior to the decision below, the First Circuit itself had squarely held in *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14 (1st Cir. 1993), that neither the Settlement Act nor the Settlement Agreement had accomplished "a waiver or abrogation of the Tribe's sovereign immunity." *Id.* at 16. The court in *Maynard* unanimously held that there was "no provision or source which even alludes to the concept of tribal sovereign immunity, much less to its relinquishment," and it noted that the Narragansetts' settlement of land claims "neither says nor implies anything about a surrender of its sovereign immunity from suit relating to its territorial or extraterritorial actions." *Id.* In the decision below, without citing any intervening statutes or new evidence, the First Circuit expressly "disavow[ed]" *Maynard*. Pet. App. 23a.[6]

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[6] The majority weakly suggested that *Maynard* might be distinguishable. *See id.* at 22a-23a & n.8; *see also id.* at 36a-37a. But *Maynard* is unambiguous, *see* Pet. App. 35a-36a (Lipez, J., dissenting), and other First Circuit panels had read *Maynard* to mean what it said. For example, in *Narragansett Tribe v. Guilbert*, 989 F.2d 484, 1993 WL 88161 (1st Cir. 1993) (unpublished table decision), then-Chief Judge Breyer explained that *Maynard* held that "the Narragansett Indian Tribe possesses sovereign immunity, despite Congress's enactment of the Rhode Island Indian Claims Settlement Act." *Id.* at *1.

B. The First Circuit's Decision Directly Conflicts with Numerous Decisions Holding that the Applicability of Substantive Law to a Sovereign Does Not Ipso Facto Abrogate that Sovereign's Immunity from Judicial Process.

In ruling that the Settlement Act abrogates tribal sovereign immunity by granting jurisdiction to the State to apply its substantive laws to the settlement lands, the First Circuit also expressly rejected the well-settled distinction between whether state law *applies* to a Tribe and whether a State can *enforce* that law through judicial process directed at a tribal government and tribal government property. *See* Pet. App. 13a-14a. Indeed, the court below began its analysis by expressly overruling its prior decision in *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 68 (1st Cir. 2005), which had recognized exactly that distinction. Pet. App. 14a. The First Circuit's novel understanding of sovereign immunity was critical to its ruling: The language making state law and jurisdiction applicable to the Narragansetts' settlement lands provided the only basis for the court of appeals' elimination of the Tribe's sovereign immunity.

The First Circuit's decision in this regard is flatly at odds with decisions of this Court and other courts of appeals. In *Kiowa Tribe*, for example, this Court considered whether sovereign immunity barred a suit in state court for breach of contract involving off-reservation conduct. 523 U.S. at 754. While recognizing that States generally may apply their substantive laws to tribal activities occurring outside Indian reservation lands, the Court held that "[t]o say state substantive laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. . . . *There is a difference between the right to demand compliance with state laws and the means available to enforce them.*" *Id.* at 755 (emphasis added). Similarly, in *Citizen Band Potawatomi*, the Court made clear that,

although "tribal sellers are obliged to collect and remit state taxes on sales to nonmembers at Indian smokeshops on reservation lands," sovereign immunity barred the State from enforcing that right by suing the Tribe directly. 498 U.S. at 513-14.

Relying on *Kiowa Tribe*, other federal courts of appeals have expressly held that the applicability of substantive law to a Tribe does not abrogate the Tribe's sovereign immunity from suit to enforce that law. In *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126 (11th Cir. 1999), the Eleventh Circuit held that under the principle of *Kiowa Tribe* "whether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions." *Id.* at 1130. Applying this distinction, the court ruled that while Title III of the Americans With Disabilities Act applied to the Tribe, tribal sovereign immunity barred an action against the Tribe for violating the Act. *Id.* at 1130-35. Similarly, the Second Circuit held in *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir. 2000), applying the Copyright Act, that "the fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it." *Id.* at 357; *see also Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 85 n.5 (2d Cir. 2001); *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir.), *cert. denied*, 543 U.S. 966 (2004).

This same principle is equally important in this Court's jurisprudence outside of Indian law. Although Congress may enact federal laws that apply to the States, whether state sovereign immunity has been validly waived to permit enforcement of those laws is a separate question. *See, e.g., Board of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. at 374 n.9. And this Court has similarly concluded without exception that grants of "jurisdiction" to courts do not abrogate sovereign immunity, whether that immunity belongs to States, the United States, or Tribes. *See Nordic Village*,

503 U.S. at 38; *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 776 (1991); *see also Mack v. United States*, 814 F.2d 120, 122-23 (2d Cir. 1987); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (8th Cir. 1967).

In sum, the First Circuit's holding that the applicability of substantive law to a Tribe also abrogates its sovereign immunity squarely conflicts with decisions of this Court and of the Second and Eleventh Circuits. Review by this Court is necessary to resolve this conflict and to correct a serious error of federal law on a question that is fundamental in both this Court's Indian-law jurisprudence and its jurisprudence outside of Indian law.

C. "Idiosyncratic" Features of the Settlement Do Not Support the First Circuit's Decision.

Although the First Circuit purported to focus on "idiosyncratic" features of the Settlement Act and the Settlement Agreement, Pet. App. 10a; *accord id.* at 17a n.5, there is no doubt that its decision squarely conflicts with the cases described above.

1. The Court of Appeals focused on the term "jurisdiction" and concluded that "if the reference to 'jurisdiction' in section 1708(a) is to have any meaning, it must effectuate some limitation on the Tribe's sovereign immunity." Pet. App. 16a-17a. That conclusion is plainly wrong.

First, the majority's logic is directly at odds with *Bryan* and *Three Affiliated Tribes*, where this Court emphatically rejected the notion that the unadorned reference to state "jurisdiction" in federal legislation would divest a Tribe of its sovereign immunity. *See Bryan*, 426 U.S. at 388-90; *Three Affiliated Tribes*, 476 U.S. at 890-92. Thus, whatever the word "jurisdiction" means in the statute, it cannot mean that tribal sovereign immunity is abrogated. Indeed, since *Bryan*,

no other court has *ever* held that the assignment of "jurisdiction" abrogates sovereign immunity. The First Circuit's stubborn conclusion to the contrary flatly contradicts *Bryan* and *Three Affiliated Tribes*.

Second, the First Circuit is wrong that reading the term "jurisdiction" to grant jurisdiction without waiving tribal sovereign immunity would render the term "mere surplusage." Pet. App. 16a. It is beyond dispute that States generally lack jurisdiction over suits involving Indians that arise on Indian lands, *see supra* note 5 – indeed, the First Circuit recognized as much later in its opinion. Pet. App. 20a. Against that backdrop, the grant of "jurisdiction" in the Settlement Act – like those in Public Law 280, the land-claims settlement acts, and the federal-recognition acts – simply provides state courts with jurisdiction over activities on Indian lands. In short, Section 1708(a) has the same effect as Public Law 280: It grants jurisdiction that the State would otherwise lack. *Cf. Three Affiliated Tribes*, 476 U.S. at 879. The fear that the statutory term would be superfluous thus provides no reason to disregard *Bryan* and its progeny. *See* Pet. App. 37a-39a.

2. A second alleged "idiosyncrasy" on which the Court of Appeals relied was the Settlement Agreement's provision that "all laws of the State of Rhode Island shall be in full force and effect on the Settlement Lands." Pet. App. 10a. But that provision cannot possibly serve to *distinguish* this Court's decision in *Bryan* because, as the Court noted in *Bryan*, Public Law 280 provides that state laws "'shall have the same force and effect within such Indian country as they have elsewhere within the State.'" 426 U.S. at 377 (quoting 28 U.S.C. § 1360(a)). It is precisely the First Circuit's interpretation of that language in the face of *Bryan* that creates the conflict.

Nor is the analysis altered by the First Circuit's observation that the Settlement Agreement "did not

materialize out of thin air; it followed intense negotiations and led to the Tribe's receipt of over 1800 acres of land." Pet. App. 9a. *First*, although it cited the "intense negotiations," *id.*, the court never claimed that there was even a mention of tribal sovereign immunity in those negotiations, and indeed no party has ever asserted that there was. Thus, the negotiations do not render this case "idiosyncratic."

Second, that the Agreement resulted from voluntary negotiations cannot eliminate the split. Indeed, at the time *Bryan* was decided, Public Law 280 also required a Tribe's voluntary agreement to state jurisdiction. *Bryan*, 426 U.S. at 386. But nothing in *Bryan* suggests that such agreement would waive tribal sovereign immunity. The "voluntariness" of the State's assumption of jurisdiction is thus not a basis to distinguish Public Law 280 or to eliminate the direct conflict.

Third, the distinction offered by the First Circuit makes no sense. Even if the jurisdiction were by "mutual consent," Pet. App. 16a, 20a, that begs the question of what the parties were consenting to. The inescapable fact is that, a mere two years after *Bryan* was decided, the parties consented to the precise language construed by this Court in *Bryan*. The First Circuit had no license to ignore this Court's unambiguous definition of that language.[7]

The conflict presented here is thus direct and unavoidable.

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[7] The First Circuit also distinguished Section 1708 from Public Law 280 as construed in *Bryan* by relying on its prior decision in *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694-97 (1st Cir. 1994), which held that Section 1708, unlike Public Law 280, conferred regulatory jurisdiction upon Rhode Island over the Tribe's lands. Pet. App. 21a. But even if this conclusion were correct – which the Tribe does not concede – Section 1708 would at most authorize the State to enforce its regulatory laws against tribal members on reservation lands, not against the Tribe itself in the operation of its own government.

II. THE ISSUE PRESENTED IS OF THE UTMOST IMPORTANCE.

Review is warranted now because the issue presented is critically important not just in Rhode Island but throughout Indian country. As Judge Lipez noted in his dissent, the "history of litigation and legislation outlined in the majority opinion is prototypical of that involving several tribes, especially in the East but also in parts of the West," and thus "[w]hat the majority says about sovereign immunity in this case has implications for the application of sovereign immunity in these similar contexts." Pet. App. 27a-28a.

Judge Lipez was correct. Congress understood that the Rhode Island Act was "the first legislation submitted to the Congress which would resolve the land claims of an Indian Tribe arising under the Trade and Intercourse Act of 1790 . . . on the basis of an out-of-court settlement negotiated between the Tribe and the affected parties." H.R. Rep. No. 95-1453, at 7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1948, 1951. Congress intended the bill to be "precedential" and a "landmark for the resolution of other land claims by eastern tribes under the Trade and Intercourse Act." *Id.* at 7-8. And indeed, many land-claims settlement acts contain similar language. *See, e.g.*, Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, § 6, 97 Stat. 851, 855 (1983) (codified at 25 U.S.C. § 1755) ("the reservation of the Tribe . . . [is] subject to State jurisdiction to the maximum extent provided in" Public Law 280); Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, § 9, 101 Stat. 704, 709 (codified at 25 U.S.C. § 1771g) ("settlement lands . . . shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the Town of Gay Head, Massachusetts"); Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, Pub. L. No. 103-377, § 6, 108 Stat. 3501, 3505 (codified at 25 U.S.C. § 1775d(a))

(authorizing "assumption of jurisdiction of the State of Connecticut over criminal offenses committed by or against Indians on the reservation . . . to the same extent as the State has jurisdiction over such offenses committed elsewhere within the State," and providing that "[t]he criminal laws of the State shall have the same force within such reservation . . . as such laws have elsewhere within the State"). All reservations subject to these acts could be affected by the First Circuit's aberrant decision. *See* Pet. App. 27a-28a, 35a-36a, 44a n.17.

As noted above, the impact of this case extends beyond land-claims settlement acts to settlement legislation providing federal recognition to specific Tribes, *see, e.g.*, 25 U.S.C. § 1300b-11 (Texas Band of Kickapoo Indians); *id.* § 1300f (Pascua Yaqui Tribe); *id.* § 1300g-4(f) (Ysleta del Sur Pueblo), and to Public Law 280, which applies to hundreds of Tribes in 11 States, spread across four federal judicial circuits.[8] The First Circuit's jurisdictional holding is thus of broad nationwide significance.

Moreover, the decision's consequences for Tribes are far-reaching. First, the court below read the Settlement Act as effecting a broad abrogation of tribal sovereign immunity, subject only to the grudging acknowledgement that the Tribe would retain "some degree of autonomy 'in matters of local governance,' including 'matters such as membership rules, inheritance rules, and the regulation of domestic relations.'" Pet. App. 17a (citation omitted). But limiting sovereign immunity to these few areas would eviscerate Tribes' ability to function as sovereign governments rather than as "private, voluntary organizations," *Mazurie*, 419 U.S. at 557, and

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[8] The 11 States are Alaska, California, Florida, Idaho, Iowa, Minnesota, Montana, Nebraska, Oregon, Washington, and Wisconsin. *See generally* Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 Conn. L. Rev. 697, 697 & n.2 (2006).

would leave Tribes subordinate to the command of state officials empowered to enforce state law. This Court has, by contrast, specifically rejected arguments that tribal immunity from suit should be confined to transactions on reservations, to the internal affairs of tribal government, or to governmental activities generally; and it has explained that "Congress has consistently reiterated its approval of the immunity doctrine," reflecting Congress's "desire to promote the 'goal of Indian self-government, including its "overriding goals" of self-sufficiency and economic development.'" *Citizen Band Potawatomi*, 498 U.S. at 510 (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)); *see Kiowa Tribe*, 523 U.S. at 755.

Indeed, the decision below threatens much of the recent progress in tribal-state relations. In areas such as tax and criminal law enforcement, Tribes and States increasingly have settled their differences on a sovereign-to-sovereign basis, forging bilateral agreements that resolve jurisdictional conflicts and provide mutual waivers of sovereign immunity. *See Nevada v. Hicks*, 533 U.S. 353, 372 (2001) (expressly recognizing "state-tribal cooperative agreements, including those pertaining to mutual law enforcement assistance, tax administration assistance, and child support and paternity matters"); *id.* at 393 (O'Connor, J., concurring) (providing numerous examples of States that have "enter[ed] into consensual relationships with tribes, such as contracts for services or shared authority over public resources"). If a State may use its coercive power to compel surrender of tribal immunity (while preserving its own immunity), this growing body of tribal-state agreements that benefit Indians and non-Indians alike is in jeopardy. Such a drastic reworking of tribal-state relations – for the Narragansetts and for scores of other Tribes – without any indication that this is what Congress intended, cries out for review.

Finally, the troubling practical implications of the First Circuit's decision are well illustrated by the facts of this case. The parties were engaged in what was indisputably a good-faith disagreement over the applicability of certain state tax laws. Rather than continuing discussions or engaging in civil litigation, the State resorted to armed enforcement of a state-court-issued search warrant. No federal or foreign sovereign would be subject to such treatment,[9] and the intrusion on tribal dignity was brazen and severe. It is hard to imagine an approach better designed to provoke a violent confrontation. No sensible rule of law would encourage such a result.

The fact that this Court very recently noted but reserved issues relating to state searches and seizures of Tribes' on-reservation property speaks both to the recurring nature of these conflicts and to their importance. In *Inyo County v. Paiute Shoshone Indians*, the Court granted certiorari in a case that likewise involved a tribal challenge to a State's efforts to enforce a search warrant against a Tribe and tribal government property. *See* 538 U.S. at 712 (noting, but reserving, Tribe's claimed right to be free from criminal processes). Here, the issues are squarely framed and cleanly presented, and this Court should resolve them now.

III. THE FIRST CIRCUIT'S DECISION IS PLAINLY INCORRECT.

The decision below also merits review because it is flat wrong. No other case holds that statutory language remotely like the language here effects an abrogation of immunity.

1. The First Circuit's decision is irreconcilable with case law from this Court regarding waiver and abrogation of

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[9] *See, e.g., Buchanan v. Alexander*, 45 U.S. (4 How.) 20, 21 (1846); *Elko County Grand Jury v. Siminoe (In re Elko County Grand Jury)*, 109 F.3d 554, 556 (9th Cir. 1997); Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 22, cl. 1, 23 U.S.T. 3227; Vienna Convention on Consular Relations, Apr. 24, 1963, art. 31, cl. 1, 21 U.S.T. 77.

sovereign immunity. As this Court has made clear, "a waiver of [tribal] sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo*, 436 U.S. at 58 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). That holding, which was expressly reaffirmed in *C&L Enterprises*, 532 U.S. at 418, protects tribal sovereign immunity using the same high standard that protects the immunity of the federal government and the States. *Nordic Village*, 503 U.S. at 33-34 (waiver of federal government's sovereign immunity must be "unequivocally expressed"); *Green v. Mansour*, 474 U.S. 64, 68 (1985) ("States may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress . . . unequivocally expresses its intent to abrogate the immunity.").

The First Circuit's decision makes a mockery of this case law. Neither the Settlement Act nor the Settlement Agreement (nor the history of either) contains any evidence that the Tribe or Congress intended to subject the Tribe and its government – as distinct from individual tribal members – to the jurisdiction of state courts. Pet. App. 34a & n.13, 47a, 127a-144a.[10] Nor does the language of the Act refer at all to sovereign immunity – indeed, as noted above, the language used has authoritatively been construed by this Court *not* to abrogate sovereign immunity.

The First Circuit's approach is all the more egregious because Congress has *expressly* abrogated tribal immunity in other land-claims settlement acts. In the Maine Indian Claims Settlement Act – passed in 1980 by virtually the same Congress that just two years earlier enacted the Rhode Island Act – Congress provided that Indian Tribes in Maine "may sue and be sued in the courts of the State of Maine and the

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[10] The absence of such evidence is telling. As the Court stated in *Bryan*, "some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress." 426 U.S. at 381.

United States to the same extent as any other entity or person residing in the State of Maine." 25 U.S.C. § 1725(d)(1). If Congress had intended to abrogate the Narragansetts' sovereign immunity in the 1978 Act, it would have said so, as it did in the Maine Act two years later. Pet. App. 33a n.11, 50a; *see Bryan*, 426 U.S. at 389-90 (clear abrogation language in termination acts is strong evidence that Congress did not intend to abrogate when it used different language in Public Law 280).

2. The First Circuit likewise erred in its apparent belief that its result was necessary to give effect to the state tax laws at issue here. In *Citizen Band Potawatomi*, this Court expressly rejected the State's complaint that allowing the State to impose the tax but not to sue to collect it would effectively "give them a right without any remedy." 498 U.S. at 514. Although "sovereign immunity bars the State from pursuing the most efficient remedy," the Court was "not persuaded that [the State] lacks any adequate alternatives." *Id.*; *see id.* (listing remedies).

3. Finally, to the extent the First Circuit had concerns about the practical impact of tribal sovereign immunity more broadly, it was error to address those concerns by radically reinterpreting settled law. This Court has repeatedly "defer[red] to the role Congress may wish to exercise" in shaping tribal sovereign immunity, recognizing that Congress is best positioned "to weigh and accommodate the competing policy concerns and reliance interests." *Kiowa Tribe*, 523 U.S. at 758-59. If Congress is unhappy with the allocation of jurisdiction accomplished by Public Law 280, the Rhode Island Indian Claims Settlement Act, and similar legislation, Congress knows how to change it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 21, 2006

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 04-1155

NARRAGANSETT INDIAN TRIBE,
Plaintiff, Appellant,

v.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF RHODE ISLAND
[Hon. William E. Smith, *U.S. District Judge*]

Before BOUDIN, *Chief Judge*, TORRUELLA, SELYA, LYNCH, LIPEZ and HOWARD, *Circuit Judges*.

OPINION EN BANC

May 24, 2006

SELYA, *Circuit Judge*. This case pits the Narragansett Indian Tribe (the Tribe) against the State of Rhode Island

(the State).[1] It requires us to answer a challenging question of first impression: May officers of the State, acting pursuant to an otherwise valid search warrant, enter upon tribal lands and seize contraband (in this case, unstamped, untaxed cigarettes) owned by the Tribe and held by it for sale to the general public?

The district court answered this question affirmatively. *See Narragansett Indian Tribe v. Rhode Island,* 296 F. Supp. 2d 153, 170 (D.R.I. 2003). A panel of this court disagreed in part, holding that the Tribe's sovereign immunity insulated it from the State's criminal process. *See Narragansett Indian Tribe v. Rhode Island,* No. 04-1155, slip op. at 36 (1st Cir. May 12, 2005). The en banc court withdrew Parts II(D)(3) and (4) of that opinion, *id.* at 29-36, and ordered rehearing en banc limited to the questions of whether, to what extent, and in what manner Rhode Island may enforce its civil and criminal laws with respect to the particular activities of the Tribe here at issue.

After careful review, we hold that, given the language and intent of the Rhode Island Indian Claims Settlement Act (the Settlement Act), 25 U.S.C. §§ 1701-1716, state officers were authorized to execute the warrant against the Tribe and to arrest tribal members incident to the enforcement of the State's civil and criminal laws. We therefore affirm the judgment of the district court.

I. BACKGROUND

We begin with a synopsis of the unique relationship between the Tribe and the State and then turn to the

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[1] The named defendants include various Rhode Island state officials, the Town of Charlestown, and the Charlestown Police Department. Because the central dispute is between the Tribe and the State, we address it in those terms.

particulars of the current dispute. For these purposes, we assume the reader's familiarity with the history of the dispute as described in the opinions of the district court and the panel.

A. The Relationship Between the Tribe and the State.

The Narragansett Indians, aboriginal inhabitants of what is now Rhode Island, enjoyed cordial relations with the early English settlers on Roger Williams's Providence Plantations. This peaceful coexistence ended in 1675, when the Tribe was drawn into King Philip's War against Puritan colonists. The war decimated the Tribe, and its surviving members settled in the vicinity of what is now Charlestown, Rhode Island. In 1880, after nearly a century of resistance to the State's assimilation efforts, the Tribe agreed to surrender its tribal authority and to sell all but two acres of its lands for the sum of $5,000. Almost immediately, the Tribe regretted the sale. In an effort to recoup the lands, it launched a protracted legal and political battle. *See generally Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n,* 158 F.3d 1335, 1336 (D.C. Cir. 1998).

This endeavor reached a fever pitch in 1975, when the Tribe filed a pair of complaints in the United States District Court for the District of Rhode Island. In these complaints, the Tribe alleged that it possessed approximately 3,200 acres of land as part of its aboriginal territory; that the 1880 conveyance of that land mass was void under the Indian Nonintercourse Act, 25 U.S.C. § 177, because the State failed to secure federal approval; and that, inasmuch as its aboriginal title had never been extinguished, the Tribe held a claim of title superior to that of any landowner whose chain of title depended upon the 1880 sale. *See id.* at 1336-37.

The pending litigation clouded the titles of hundreds of Rhode Island landowners. To dissipate this cloud, the State, the town of Charlestown, and the affected landowners, as

parties of the first part, and the Tribe, as party of the second part, executed a joint memorandum of understanding (the J-Mem) on February 28, 1978. The J-Mem created a carefully calibrated relationship between the Tribe and the State centering on 1,800 acres of land in and around Charlestown (the settlement lands). The J-Mem provided that the settlement lands would be formed out of two parcels, one donated by the State and the other purchased from private landowners with funds furnished by the federal government. The Tribe gained effective control of the settlement lands in exchange for the relinquishment of its claims, the voluntary dismissal of its lawsuits, and its agreement that, with the exception of state hunting and fishing regulations, "all laws of the State of Rhode Island shall be in full force and effect on the settlement lands." In addition to donating half the settlement lands, the State agreed to create an Indian-controlled corporation to hold the settlement lands in trust for the Tribe, to exempt the settlement lands from local taxation, and to work toward securing passage of the federal legislation necessary to implement the agreement. *See generally Narragansett Indian Tribe v. Rhode Island*, 296 F. Supp. 2d at 161.

Both the Rhode Island General Assembly and Congress subsequently passed the necessary enabling legislation. *See* R.I. Gen. Laws §§ 37-18-1 to 37-18-15; 25 U.S.C. §§ 1701-1716. Dovetailing with the counterpart provision of the J-Mem, the federal piece of this legislative mosaic — the Settlement Act — declared that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708(a).[2]

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[2] The statutory scheme does exempt the settlement lands from state hunting and fishing regulations, *see* 25 U.S.C. § 1706(a)(3), but that exemption is of no consequence here.

The conveyances to the holding company followed apace. The Secretary of the Interior thereafter granted the Tribe official federal recognition. *See* 48 Fed. Reg. 6,177-6,178 (Feb. 2, 1983). On the heels of this recognition, the settlement lands changed hands twice more. In 1985, the Rhode Island General Assembly amended the pertinent state statute to permit the conveyance of the settlement lands directly to the Tribe; the amendments included a provision that preserved the State's jurisdiction over the settlement lands in terms substantially identical to those memorialized in section 1708(a). *See* R.I. Gen. Laws § 37-18-13(b). The holding company later made the authorized conveyance.

Three years thereafter, the Tribe deeded the settlement lands to the Bureau of Indian Affairs (the BIA) as trustee. The trust deed explicitly confirmed the applicability of state law on the settlement lands as provided by section 1708(a). The BIA continues to hold the settlement lands in trust for the Tribe. *See Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 689, 695 & n.8 (1st Cir. 1994).

During the next quarter-century, the relationship between the Tribe and the State was fraught with tension. *See, e.g., id.* at 690-91 (chronicling a long-running dispute anent the Tribe's desire to conduct gambling operations on the settlement lands). Having failed in its persistent efforts to launch a gaming facility, the Tribe eventually turned to tobacco as a potential source of revenue. This case represents the culmination of that endeavor.

B. The Controversy at Hand.

Rhode Island law establishes a complex scheme for the taxation of cigarettes. *See* R.I. Gen. Laws §§ 44-20-1 to 44-20-55. Under that scheme, the State imposes an excise tax on all cigarettes sold, distributed, or held for sale or distribution within its borders. *Id.* §§ 44-20-12, 44-20-13. The excise tax is collected through the sale of cigarette

stamps, which must be affixed to every package of cigarettes brought into the State. *Id.* §§ 44-20-13, 44-20-18, 44-20-29. A dealer has twenty-four hours after coming into possession of unstamped cigarettes within which to affix the stamps. *Id.* § 44-20-29. The sale or purchase of unstamped cigarettes is a misdemeanor. *Id.* §§ 44-20-33, 44-20-35, 44-20-36. Unstamped cigarettes are contraband and, as such, are subject to seizure by the State. *Id.* § 44-20-37.

On July 12, 2003, the Tribe, acting pursuant to a tribal ordinance, opened a smoke shop on the settlement lands. The smoke shop offered an array of cigarettes for sale to the general public (i.e., members of the Tribe and nonmembers alike). The Tribe's avowed purpose in establishing the smoke shop was to generate funds for its social programs.

Believing that the State lacked the legal authority to compel its compliance with the cigarette tax scheme, the Tribe refused to purchase cigarette stamps. It also refused to precollect the State's sales tax, *see id.* § 44-18-19, from those who purchased the Tribe's cigarettes. By dint of these refusals, the Tribe was able to sell unstamped, untaxed cigarettes at prices substantially below market.

On July 14, 2003, Rhode Island State Police entered the settlement lands and raided the smoke shop. Their intent was to seize contraband cigarettes pursuant to a search warrant issued by a state court of competent jurisdiction. Despite the warrant, the troopers' entry sparked an altercation with members of the Tribe. When the smoke cleared, the troopers had arrested eight individuals, including the Tribe's Chief Sachem, and had confiscated the Tribe's entire inventory of unstamped, untaxed cigarettes.

In the aftermath of this acrimonious episode, the Tribe filed suit in the federal district court, seeking a declaratory judgment that its sovereign status as a federally recognized Indian tribe precluded the State from applying its cigarette

tax scheme to the Tribe's sale of cigarettes on the settlement lands. Relatedly, the Tribe sought a declaration that sovereign immunity insulated it from the State's criminal process and shielded from arrest those tribal members who had participated in the operation of the smoke shop. After submitting the case on stipulated facts, the parties cross-moved for summary judgment.

The district court granted brevis disposition in the State's favor, grounding its decision on two crucial determinations. First, the court concluded that the legal incidence of the cigarette tax fell on the purchaser rather than the seller and that, therefore, the Tribe had to comply with the tax scheme when selling cigarettes on the settlement lands. 296 F. Supp. 2d at 167. Second, the court concluded that section 1708(a) of the Settlement Act authorized state officers to enter the settlement lands, seize the Tribe's stock of unstamped, untaxed cigarettes, and arrest tribal members working in the smoke shop. *Id.* at 170, 177.

The Tribe appealed. A panel of this court affirmed in part and reversed in part. The panel accepted the district court's determination that the Tribe must comply with the State's cigarette tax scheme when selling cigarettes on the settlement lands.[3] Op. at 24-25. The panel disagreed, however, with the lower court's ruling that the State could enforce the cigarette tax scheme through the execution of a search warrant against the Tribe. *Id.* at 33. Although section

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[3] In granting rehearing en banc, we chose not to revisit this point. That choice left intact the panel's holding that the Tribe must comply with the cigarette tax scheme when it sells cigarettes on the settlement lands. That holding has, therefore, become the law of the case. *See United States v. Moran*, 393 F.3d 1, 7 (1st Cir. 2004) (stating that "a legal decision made at one stage of a . . . civil proceeding should remain the law of that case throughout the litigation, unless and until the decision is modified or overruled by a higher court").

1708(a) preserved the State's criminal jurisdiction over the settlement lands, the panel reasoned, it did not grant the State criminal jurisdiction over the Tribe and, accordingly, the Tribe's sovereign immunity prevented the State from executing a search warrant against the Tribe. *Id.* at 33.

On the State's petition, *see* Fed. R. App. P. 35(b), we vacated the portions of the panel opinion relating to the State's enforcement powers and granted rehearing en banc on the narrow questions of "whether, to what extent, and in what manner Rhode Island may enforce its civil and criminal laws with respect to the operation of the [s]moke [s]hop by the Narragansett Indian Tribe" and "the effect (if any) of tribal sovereign immunity" on the State's enforcement authority. *Narragansett Indian Tribe v. Rhode Island*, 415 F.3d 134 (1st Cir. 2005) (unpublished order). We turn now to those questions.

II. ANALYSIS

It is beyond peradventure that a state may seize contraband cigarettes located outside Indian lands but in transit to a tribal smoke shop. *See Washington v. Confed. Tribes of Colville Indian Reserv.*, 447 U.S. 134, 161-62 (1980). Withal, the question of whether a state, as a general matter, may enter Indian lands and seize unstamped cigarettes owned by an Indian tribe is open. *See id.* at 162. We need not answer that vexing question in the abstract; here, the plain language and purport of the J-Mem and the Settlement Act supply the answer with respect to activities on the settlement lands.

We bifurcate our analysis, first addressing whether the State may execute a search warrant on the settlement lands and then mulling whether tribal sovereign immunity can be said to prevent the State from executing such a warrant

against the Tribe and from arresting tribal members involved in the smoke shop enterprise.[4]

A. The Ability to Execute a Search Warrant.

The State asseverates that the J-Mem and the Settlement Act, when read in light of the unique historical context in which they arose, permitted state officers to execute a search warrant on the settlement lands as part of the due enforcement of the State's cigarette tax scheme. We think that proposition is correct.

The Tribe agreed in the J-Mem (with certain modest exceptions not relevant here) that "all laws of the State of Rhode Island shall be in full force and effect on the settlement lands." That agreement did not materialize out of thin air; it followed intense negotiations and led to the Tribe's receipt of over 1,800 acres of land. Congress confirmed this negotiated arrangement in the Settlement Act, mandating (again with explicit but modest exceptions) that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708(a). As the unqualified language of both the J-Mem and the Settlement Act makes pellucid, the authority ceded to the State and assented to by the Tribe was broad in its terms. The negotiated arrangement and the confirmatory

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[4] In his separate dissent, Judge Torruella argues that this second question is not properly before the en banc court under the law of the case doctrine. *See post* at [45a n.18] (Torruella, J., dissenting). This argument mischaracterizes the unrevoked portion of the panel opinion, which concludes only that the Settlement Act did not effectuate a "*wholesale* abrogation of the Tribe's sovereign immunity." Op. at 27 (emphasis supplied). This statement leaves ample room for us to examine the dimensions of the Tribe's sovereign immunity vis-à-vis the settlement lands. In all events, the order granting rehearing en banc, quoted *supra*, indisputably opened the sovereign immunity question to our consideration.

statute effectively extinguished the Tribe's right to resist the application of state authority as to matters occurring on the settlement lands. And that arrangement drew no distinction between tribal members and the Tribe itself, on the one hand, and the general public, on the other hand.

In effect, then, the Tribe abandoned any right to an autonomous enclave, submitting itself to state law as a quid pro quo for obtaining the land that it cherished. It is surpassingly difficult to imagine what the linguistic formulation that embodied this concession would entail if not an acknowledgment that the State may enforce its applicable criminal laws on the settlement lands by conventional means; any contrary interpretation would make the relevant provisions of both the J-Mem and the Settlement Act meaningless. The execution of a search warrant referable to violations of the State's legally binding cigarette tax scheme falls squarely within the ambit of the ceded authority. Indeed, the carefully calibrated agreement between the Tribe and the State — an agreement from which, by virtue of the creation and conveyance of the settlement lands, the Tribe greatly benefited — would be altered dramatically if the State were without power to enforce its binding laws through conventional means such as the execution of a search warrant on the settlement lands.

The J-Mem, the Settlement Act, and their historical antecedents make this case strikingly different from the mine-run of cases that have struggled to reconcile the sovereignty of Indian tribes with the legitimate interests of host states. Thus, we rest our decision squarely on these idiosyncratic features. We note, however — contrary to the view of our dissenting brethren — that the general body of Indian law also supports a conclusion that the State may undertake the enforcement activities at issue in this case.

The Supreme Court has held that because Congress has plenary power over Indian matters, *see Morton v. Mancari*, 417 U.S. 535, 551-52 (1974), the assertion of state suzerainty within tribal lands is permissible where it has not been preempted by the operation of federal law. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983). The application of federal preemption doctrine in Indian matters has special characteristics; it "calls for a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.* (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980)). Courts must conduct this inquiry in the albedo of traditional notions of Indian sovereignty, including the settled federal policy of promoting Indian self-governance and the overarching goal of encouraging tribal self-sufficiency and economic development. *Id.* at 334-35.

Employing this paradigm requires us to identify and weigh the competing state, federal, and tribal interests that obtain within the concrete factual context of this dispute. In conducting this tamisage, we are cognizant that Congress has not granted the Tribe any special powers with respect to the specific subject matter involved here (cigarette sales). This is important because, in the absence of special legislation, the balance of state, federal, and tribal interests in regard to cigarette taxation leaves considerable room for state intervention on tribal lands. *See Dep't of Tax. & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 73 (1994). Here, special legislation of a different sort — the Settlement Act — figures in the balance, and, as we have explained, that legislation *increases* the room for state intervention.

Keeping in mind that both the Tribe and its members are subject to a legal obligation to comply with the State's cigarette tax scheme, *see supra* note 3, it is readily evident that the State's interest in maintaining the integrity of that

scheme contrasts favorably with the Tribe's interest in operating the smoke shop as a tax haven. Appropriate enforcement measures are needed to check wholesale transgressions of the State's scheme by price-conscious purchasers willing to flout their legal obligations. *See Moe v. Confed. Salish and Kootenai Tribes,* 425 U.S. 463, 482 (1976). Enforcement is also necessary to prevent the Tribe "from marketing [its] tax exemption to nonmembers who do not receive significant tribal services and who would otherwise purchase their cigarettes" outside the settlement lands. *Colville,* 447 U.S. at 157.

The Tribe's countervailing interest is not impressive. Although the Tribe has a legitimate stake in generating revenue for its social programs free from *unwarranted* state interference, that interest is significantly weaker where, as here, it seeks to purvey goods made by outsiders — goods as to which the Tribe has only a fleeting commercial connection. *See Mescalero Apache Tribe,* 462 U.S. at 341; *see also Colville,* 447 U.S. at 156-57. Moreover, the fact that the Tribe and its members are legally required to comply with the State's cigarette tax scheme makes it very difficult for the Tribe to identify any legitimate reason for resisting state enforcement of the scheme. In this case, then, the scales tip in favor of recognizing the State's authority to execute a search warrant on the settlement lands.

Endeavoring to blunt the force of this reasoning, the Tribe importunes us to resurrect a line of cases that at one time insulated tribal action on tribal lands from state interference independent of federal preemption. *See, e.g., Williams v. Lee,* 358 U.S. 217, 220 (1959) (pronouncing that Indian tribes' inherent sovereign right to "make their own laws and be ruled by them" constitutes a bar to state action on tribal lands). We reject these importunings. While the approach of treating inherent tribal sovereignty as an

independent impediment to state action on tribal lands has never been abandoned by the Supreme Court in haec verba, the Justices have come to treat this doctrine as no more than a piece of the background against which preemption analysis must be conducted. *See, e.g., Nevada v. Hicks,* 533 U.S. 353, 362-64 (2001) (indicating that state officers may execute, on reservation lands, a search warrant referable to a tribal member's off-reservation violation of state law); *see also Colville,* 447 U.S. at 156; *McClanahan v. Ariz. State Tax Comm'n,* 411 U.S. 164, 172 (1973).

To sum up, the J-Mem and the Settlement Act, seen in their historical setting, compel a conclusion that the State retains the authority to issue and enforce a search warrant relative to the sale of unstamped, untaxed cigarettes on the settlement lands. General principles of Indian law reinforce that conclusion.

B. The Effect of Tribal Sovereign Immunity.

To this point, we have determined that the State may enforce its cigarette tax scheme by executing an otherwise valid search warrant on the settlement lands. The remaining question is whether tribal sovereign immunity prohibits the State from executing such a warrant *against the Tribe* or from arresting tribal members participating in the operation of the smoke shop pursuant to a tribal ordinance. We believe that the resolution of this binary question is clearly adumbrated by our earlier discussion of the purpose and effect of the J-Mem and the Settlement Act.

At the threshold, we pause to confront a point made by our dissenting brethren. They suggest that our approach to this question disregards the "subtle but important" distinction between tribal sovereignty and tribal sovereign immunity announced in a decision of a panel of this court. *Post* at [28a] (Lipez, J., with whom Torruella, J., joins, dissenting) (quoting *Aroostook Band of Micmacs v. Ryan,* 404 F.3d 48,

68 (1st Cir. 2005)). This criticism rests on shaky ground. The *Aroostook* panel-with scant citation to authority-saw a distinction that is not apparent to us; it framed the distinction as being that the doctrine of tribal sovereignty contemplates that, in certain circumstances, a tribe "is not subject to state laws . . . *at all*," whereas tribal sovereign immunity "means that [a tribe] is not amenable to *state judicial or quasi-judicial proceedings* to enforce those laws." *Aroostook*, 404 F.3d at 68 (emphasis in original). In our view, both the *Aroostook* panel's sculpting of the distinction and its ensuing discussion of the scope of tribal sovereign immunity misread the applicable Supreme Court precedents and, thus, are incorrect. As we already have explained, "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption," *McClanahan*, 411 U.S. at 172; *see Hicks*, 533 U.S. at 362, treating sovereignty instead as the source of "tribal power . . . to protect tribal self-government or to control internal relations" through tribal regulation of activities on tribal lands, *Montana v. United States*, 450 U.S. 544, 564 (1981); *see Hicks*, 533 U.S. at 358-60. Consistent with this trend, tribal sovereign immunity is most accurately considered an incidence or subset of tribal sovereignty. *See, e.g., Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (indicating that tribal sovereign immunity is an incidence of tribal sovereignty). Consequently, we expressly overrule *Aroostook* with respect to the distinction in question and proceed with our bifurcated inquiry.

1. ***Confiscation of Cigarettes.*** The Tribe asserts that its sovereign status as a federally recognized Indian tribe immunizes it from state court process, including search warrants related to the enforcement of the State's cigarette tax scheme. On this rationale, the State, even if it may enter the settlement lands and execute a search warrant against an

individual, may not execute such a warrant against the Tribe or its property. As indicated above, *see supra* Part II(A), the State's most potent retort is that the combined force of the J-Mem (by waiver) and section 1708(a) (by abrogation) defeats the Tribe's claim of sovereign immunity. We find this retort dispositive.

An Indian tribe's sovereign immunity may be limited by either tribal conduct (i.e., waiver or consent) or congressional enactment (i.e., abrogation). *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000). While such actions must be clear and unequivocal in their import, *see C & L Enters. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001), there is no requirement that talismanic phrases be employed. Thus, an effective limitation on tribal sovereign immunity need not use magic words. *See id.* at 420-21.

At the expense of repastinating ground already well-ploughed, we explain why we find both waiver and abrogation here. In the J-Mem, the Tribe, for valuable consideration received — 1,800 acres of coveted land — explicitly acknowledged that, with certain modest exceptions not applicable here, "*all* laws of the State of Rhode Island shall be in *full* force and effect on the settlement lands." (Emphasis supplied). This concession was an integral part of the bare-knuckled negotiations that created the settlement lands. Read in light of this unique historical context, the provision quoted above clearly and unambiguously establishes that the parties to the J-Mem intended to subjugate the Tribe's autonomy on and over the settlement lands (and, thus, its sovereign immunity) to the due enforcement of the State's civil and criminal laws. Any other interpretation of the J-Mem would defy common sense and,

in the bargain, nullify the State's most important quid pro quo. Hence, there was a waiver.

The record also evinces an abrogation of the Tribe's sovereign immunity with respect to activities on the settlement lands. Unlike most other federal statutes touching on the complicated relationship between tribes and states, the Settlement Act codified an agreement based on "the mutual consent of all parties." H.R. Rep. No. 95-1453, at 11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1948, 1954. In order to effectuate the parties' shared intent, the Settlement Act, consistent with the J-Mem, guaranteed that the settlement lands would be "subject to the civil and criminal laws and *jurisdiction* of the State of Rhode Island." 25 U.S.C. § 1708(a) (emphasis supplied); *see Narragansett Indian Tribe,* 19 F.3d at 695 & n.8 (noting that, at all pertinent times, the Tribe and the State took pains to reaffirm section 1708(a)'s vitality).

We must read statutes, whenever possible, to give effect to every word and phrase. *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985). Moreover, we must presume that Congress acts with knowledge of relevant Supreme Court precedent. *See Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 184-85 (1988). At the time Congress passed the Settlement Act, the Supreme Court already had adopted the approach of permitting the exercise of state jurisdiction within Indian lands where the exercise of such jurisdiction had not been preempted by federal law. *See McClanahan,* 411 U.S. at 172; *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 (1973); *Organized Vill. of Kake v. Egan,* 369 U.S. 60, 74-75 (1962). Thus, section 1708(a) would be mere surplusage if, as the Tribe contends, it contemplates no more than that the State may exercise jurisdiction within the settlement lands subject to the constraints of tribal sovereign immunity. In other words, if

the reference to "jurisdiction" in section 1708(a) is to have any meaning, it must effectuate some limitation on the Tribe's sovereign immunity. Combining this language with the historical background, we conclude that section 1708(a) largely abrogates the Tribe's sovereign immunity.[5]

We say "largely" in an abundance of caution. We recognize that the Tribe may continue to possess some degree of autonomy "in matters of local governance," including "matters such as membership rules, inheritance rules, and the regulation of domestic relations." *Narragansett Indian Tribe,* 19 F.3d at 701. But that core group of sovereign functions, whatever its dimensions, is not implicated in this case. Here, the State is seeking to enforce laws binding on the Tribe's commercial transactions with outsiders, not to dictate, say, tribal membership or inheritance rules. Whatever the exact contours of the Tribe's retained sovereignty, those contours are narrow-and it is perfectly clear that trafficking in contraband cigarettes is not within them. *Cf.* Felix S. Cohen, Handbook of Federal Indian Law 122 (1988 ed.) (noting that "Indian self-government . . . includes the power of an Indian tribe to adopt and operate under a form of government of the Indians' choosing, to define conditions of tribal membership, to

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[5] The Tribe notes that the Maine Indian Claims Settlement Act, which was passed some years after the statute at issue here, includes a more explicit abrogation of tribal sovereign immunity. *See* 25 U.S.C. § 1725(d). From this, the Tribe argues that Congress's failure to be similarly explicit in section 1708(a) heralds an intent not to cancel out the Tribe's sovereign immunity. In our view, the particulars of the Maine Act have little bearing here. *Cf. Akins v. Penobscot Nation,* 130 F.3d 482, 484 & n.2 (1st Cir. 1997) (remarking the uniqueness of the "structure of analysis" under the Maine Act and distinguishing it from the Rhode Island Settlement Act). That is particularly so given the idiosyncratic circumstances surrounding the execution of the J-Mem and the subsequent enactment of section 1708(a).

regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes" and the like).

This result is consistent with two important principles. First, the Settlement Act, properly read, ensures that the State may demand the Tribe's compliance with state laws of general application. Second, it also ensures that the State may use its entire armamentarium of legal means for redressing noncompliance. The "full force" of the State's preserved criminal jurisdiction logically encompasses the enforcement of criminal laws that are binding on the Tribe's commercial transactions with outsiders. That, in turn, encompasses the authority to execute a search warrant against the Tribe for its violations of those laws on the settlement lands. We conclude, therefore, that, under the terms of the J-Mem and the Settlement Act, the Tribe is not immune from the execution of a search warrant secured as part of the State's effort to enforce the Tribe's obligation to comply with a legally applicable cigarette tax scheme.

Judge Torruella, in his separate dissent, calumnizes this construction of the Settlement Act, arguing that it is inconsistent with the canon of construction teaching that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). In Judge Torruella's view, section 1708(a) is such a provision. *See post* at [42a] (Torruella, J., dissenting). But that argument rests on a flawed premise. Section 1708(a), when read in light of the J-Mem and the unique historical context surrounding its enactment, clearly abrogates the Tribe's sovereign immunity with respect to the State's enforcement activities on the settlement lands. And because there is no ambiguity in the meaning and purport of section 1708(a), this case does not implicate the hoary canon of construction relied on by the dissent.

The dissenters attack our reading of the "full force and effect" language on a different front as well. They assert that the Supreme Court "has held that such language . . . does not waive or abrogate tribal sovereign immunity." *Post* at [31a] (Lipez, J., with whom Torruella, J., joins, dissenting). In support of this proposition, they rely on the Supreme Court's refusal to construe language in a different federal statute (commonly referred to as Public Law 280) as an abrogation of tribal sovereign immunity. *See Three Affiliated Tribes of Fort Berthold Reserv. v. Wold Eng'g*, 476 U.S. 877, 892 (1986). This reliance is mislaid: the historical context and purpose of Public Law 280 are so completely different from those of the Settlement Act that, despite some linguistic coincidences, the Court's interpretation of that law has no bearing on the issues before us. We explain briefly.

Public Law 280 authorizes the courts of five enumerated states to assert jurisdiction over certain criminal and civil actions that may arise on designated Indian lands. *See* Pub. L. No. 83-280, §§ 2, 4, 67 Stat. 588, 588-90 (1953), *codified as amended at* 18 U.S.C. § 1162 and 28 U.S.C. § 1360. The law also prescribes a procedure by which any other state can extend its adjudicatory jurisdiction to actions arising in Indian country. *See* 25 U.S.C. §§ 1321-1322. The criminal jurisdiction component of Public Law 280 allows a state to assume "jurisdiction over offenses committed by or against Indians in . . . Indian country . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State" and mandates that "the criminal laws of such State . . . shall have the *same force and effect* within such Indian country as they have elsewhere within the State." 18 U.S.C. § 1162(a) (emphasis supplied). The civil jurisdiction component of Public Law 280 allows state courts to assume jurisdiction over "civil causes of action between Indians or to which Indians are parties which arise in . . . Indian country" and directs that "those civil laws of such

State that are of general application to private persons or private property shall have the *same force and effect* within such Indian country as they have elsewhere in the State." 28 U.S.C. § 1360(a) (emphasis supplied).

Prior to the enactment of Public Law 280, the Supreme Court had held that states had no jurisdiction to prosecute crimes committed on a reservation so long as either the perpetrator or the victim was an Indian. *See Williams v. United States*, 327 U.S. 711, 714 & n.10 (1946). In a similar vein, state courts historically have had no jurisdiction over civil suits against tribal members when the cause of action arose out of on-reservation activities. *See, e.g., Lee*, 358 U.S. at 222. For the most part, then, both types of cases were within the exclusive jurisdiction of tribal courts. *See Bryan v. Itasca County*, 426 U.S. 373, 379-83 (1976). But many tribal court systems failed to provide effective public and private justice to reservation Indians.

In an effort to ameliorate this situation, Congress enacted Public Law 280. *See id.* (explaining that Congress enacted the statute to correct this failure and to redress "the problem of lawlessness on certain Indian reservations" and "the lack of adequate Indian forums for resolving private legal disputes" involving reservation Indians). Accordingly, the predominant purposes of Public Law 280 were to provide reservation Indians with access to state courts and to authorize the application of state law to disputes arising in Indian country. *Id.* This background clearly differentiates Public Law 280's extension of state jurisdiction over Indian lands from that contemplated by the Settlement Act. Public Law 280 neither reflected the "mutual consent of all parties," H.R. Rep. No. 95-1453, at 11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1948, 1954, nor resulted from a negotiated arrangement in which a tribe surrendered certain sovereign

rights in exchange for substantial concessions from the host state.[6]

If more were needed-and we doubt that it is-Public Law 280 was primarily intended to facilitate the extension of state *adjudicatory* jurisdiction over Indian country. *See Bryan*, 426 U.S. at 379-83, 96. By contrast, the purpose of the Settlement Act was to extend "all sorts of jurisdiction," including state *regulatory* jurisdiction, over the settlement lands. *Narragansett Indian Tribe*, 19 F.3d at 695. Given the stark contrast between the purposes of these two statutes, comparing Public Law 280 and the Settlement Act is like comparing plums and pomegranates. It follows inexorably that the Supreme Court's determination that Public Law 280's "force and effect" language did not abrogate tribal sovereign immunity from civil suit is uninstructive of the meaning of the "full force and effect" phrase in the context of the carefully calibrated agreement between the Tribe and the State.[7]

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[6] In fact, Public Law 280 originally authorized states to assume civil and criminal adjudicatory jurisdiction over Indian country without first securing tribal consent. Pub. L. No. 83-280, § 7, 67 Stat. 588, 590 (1953). Congress subsequently amended the law to require such consent as a precondition to the extension of state jurisdiction over tribal lands. *See* 25 U.S.C. §§ 1321-1322; *see also Bryan*, 426 U.S. at 386.

[7] The Supreme Court cases cited by the dissenters in support of the "force and effect" argument involve Public Law 280's civil jurisdiction provision and operate against the general rule of tribal sovereign immunity from civil suit. *See Three Affiliated Tribes*, 476 U.S. at 890-91; *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 170-73 (1977); *Bryan*, 426 U.S. at 389. To our knowledge, the Supreme Court has not addressed whether sovereign immunity ordinarily insulates an Indian tribe from state criminal process or whether Public Law 280's criminal jurisdiction provision places any limitation on tribal sovereign immunity.

The Tribe takes a somewhat different path, averring that our conclusion that the J-Mem and the Settlement Act largely cancel out the Tribe's sovereign immunity is inconsistent with general principles of Indian law which, according to the Tribe, routinely vindicate claims of tribal sovereign immunity from state court process. We perceive no such inconsistency.

Most of the cases cited by the Tribe stand for the entirely unremarkable proposition that an Indian tribe is generally immune from civil suits brought by state governments or private individuals. *See, e.g., Kiowa Tribe,* 523 U.S. at 754; *Fletcher v. United States,* 116 F.3d 1315, 1324 (10th Cir. 1997); *Tamiami Partners v. Miccosukee Tribe of Indians,* 63 F.3d 1030, 1048 (11th Cir. 1995) (*Tamiami II*); *Imperial Granite Co. v. Pala Band of Mission Indians,* 940 F.2d 1269, 1271 (9th Cir. 1991); *see also TTEA v. Ysleta Del Sur Pueblo,* 181 F.3d 676, 680-81 (5th Cir. 1999) (holding that an Indian tribe enjoys sovereign immunity from an award of money damages only, not with respect to declaratory or injunctive remedies). However, these cases also recognize that tribal sovereign immunity may be circumscribed by waiver or abrogation. *See, e.g., Kiowa Tribe,* 523 U.S. at 754; *Fletcher,* 116 F.3d at 1324; *Tamiami II,* 63 F.3d at 1038 n.30. None of these cases arise under a statute configured in the fashion of the Settlement Act; nor do any of them address a state's power to enforce its admittedly applicable criminal laws against a noncompliant Indian tribe. Consequently, they offer no insight into the question of whether the State may execute a search warrant against the Tribe on the settlement lands as part of its enforcement of the Tribe's obligation to comply with binding state law.

The decision in *Maynard v. Narragansett Indian Tribe,* 984 F.2d 14 (1st Cir. 1993), does not require a different result. That case involved a civil suit against the Tribe for an

alleged trespass on private property outside the settlement lands. *Id.* at 15. In upholding the district court's dismissal of the complaint against the Tribe, a panel of this court indicated that neither the J-Mem nor the Settlement Act vitiated the Tribe's sovereign immunity. *Id.* at 15-16. The facts of the *Maynard* case dictate that any holding there was necessarily limited to civil suits premised on activities occurring outside the settlement lands. That holding may or may not be correct-the case at hand does not require us to say-but to the extent that *Maynard* contains dictum that is susceptible to a broader reading, *see, e.g., id.* at 16, that dictum is flatly incorrect, and we disavow it.[8]

In a last-ditch effort to salvage its case, the Tribe proffers a Ninth Circuit case holding that tribal sovereign immunity prohibits a state from executing a search warrant against an Indian tribe. *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 560 (9th Cir. 2002). The Tribe fails to mention that the Supreme Court subsequently vacated that decision, albeit on other grounds. *See Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 712 (2003). At any rate, the decision is easily distinguished. It neither addressed a state's power to enforce its applicable criminal laws against a noncompliant Indian tribe nor involved a statute that had the teeth that Congress implanted in the Settlement Act. Consequently, the decision offers no guidance with respect to the unique relationship between the

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[8] The Tribe's reliance on the unpublished opinion in *Narragansett Tribe v. Guilbert*, 989 F.2d 484 (1st Cir. 1993) (table), is equally misplaced. That case, like *Maynard*, involved the Tribe's immunity from a civil suit (in the form of a counterclaim for money damages) for activities occurring outside the settlement lands. In all events, the opinion has no precedential force. *See* 1st Cir. R. 32.3.

Tribe and the State in regard to activities occurring on the settlement lands.[9]

2. ***Arrests.*** The stipulated facts do not specify the basis for the arrests of tribal members during the raid. We accept for purposes of this appeal the Tribe's contention that the persons in question were arrested because of their participation in a tribally owned enterprise (the smoke shop). Building on this contention, the Tribe maintains that its sovereign immunity shielded those individuals from arrest. The premise of this argument-that the Tribe itself enjoys immunity from the enforcement activities at issue in this case-is incorrect. *See supra* Part II(B)(1). Accordingly, there is no derivative immunity available to the Tribe's members.

We add, moreover, that even if the Tribe was entitled to the protection of sovereign immunity in this case-which it is not-that protection would not cover the tribal members involved in the operation of the smoke shop. The general rule is that tribal sovereign immunity does not protect individual members of an Indian tribe. *See Puyallup Tribe, Inc. v. Dep't of Game,* 433 U.S. 165, 171-72 (1977). At its most expansive, tribal sovereign immunity may extend to tribal *officers*-but only when such officers are acting within the legitimate scope of their official capacity. *See Tamiami Partners v. Miccosukee Tribe of Indians,* 177 F.3d 1212, 1225 & n.16 (11th Cir. 1999) (*Tamiami III*) (collecting cases); *but cf. Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59 (1978) (holding that "[a]s an officer of the [Indian tribe], petitioner . . . is not protected by the tribe's immunity from suit").

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[9] The Tribe's citation to *United States v. James,* 980 F.2d 1314, 1319 (9th Cir. 1992), in which the Ninth Circuit ruled that tribal sovereign immunity bars a federal court from issuing a subpoena duces tecum against a non-party tribe, suffers from the same infirmities.

Whatever the scope of a tribal officer's official capacity, it does not encompass activities that range beyond the authority that a tribe may bestow. *See Tamiami III,* 177 F.3d at 1225; *Tamiami II,* 63 F.3d at 1045, 1050-51. It follows from this tenet that because the Tribe is legally obligated to comply with the State's cigarette tax scheme, *see supra* note 3, violations of that scheme by the Tribe's officers fall outside the scope of their official capacity. Therefore, the arrests of the Tribe's officers involved in the smoke shop operation would be valid regardless of the scope of the Tribe's sovereign immunity.

III. CONCLUSION

In the final analysis, the J-Mem and the Settlement Act dictate the result we reach. Under their terms, the Tribe surrendered any right to operate the settlement lands as an autonomous enclave. It is plainly not the case, as the Tribe would have it, that an Indian tribe can render any conceivable act on Indian lands (say, drug trafficking) impervious to state regulation by the simple expedient of labeling it "tribal." That is emphatically true with respect to the Tribe's activities on the settlement lands.

In sum, the Tribe remains as free as ever to operate the smoke shop; it simply must comply with state law in the process. That result is not disquieting: after all, no principle of federal law or tribal self-governance authorizes Indian tribes "to market an exemption from state taxation to persons who would normally do their business elsewhere." *Colville,* 447 U.S. at 155. The Tribe has not explained how being subject to the *enforcement* of the State's cigarette tax scheme is an infringement on its retained sovereignty when being subject to the *requirements* of the scheme is not.

Consistent with the foregoing, we hold, first, that the J-Mem and the Settlement Act authorized state officers to enter the settlement lands and execute a search warrant as part of

the enforcement of the State's cigarette tax scheme. Second, in light of the unique historical and legal context in which this case arises-and, particularly, the provisions of the J-Mem and the Settlement Act-we conclude that the Tribe's sovereign immunity neither prohibited the State from executing that warrant against the Tribe nor barred it from arresting tribal officers and members for activities incident to the operation of the smoke shop. Consequently, the State's actions here-its entry into the settlement lands, its seizure of the Tribe's inventory of unstamped, untaxed cigarettes, and the accompanying arrests-were lawful.

In arriving at these conclusions, we do not diminish the dignity and respect that should be afforded the Tribe as a sovereign entity. Nor do we imply that dragnet arrests and police raids on the settlement lands should be the State's preferred method for enforcing the Tribe's obligation to comply with state law. We recognize, however, that the Tribe and the State negotiated a carefully calibrated agreement between sovereigns, memorialized that agreement in the J-Mem, and sealed the deal by obtaining Congress's imprimatur. It is not for the courts to rewrite the terms of that arrangement.

The district court's order granting the appellees' motion for summary judgment and denying the appellant's motion for summary judgment is affirmed.

LIPEZ, *Circuit Judge* (with whom TORRUELLA, *Circuit Judge*, joins), dissenting.

In an apparent attempt to limit the scope of its holding, the majority claims to rest its decision "squarely on [the] idiosyncratic features" of the Narragansett Tribe's relationship with the State of Rhode Island. Then, in an effort that belies this narrow approach, the majority engages in a lengthy analysis of "the general body of Indian law" to support its idiosyncratic holding. Along the way, it repudiates two of our precedents to varying degrees. Respectfully, neither the majority's characterization of this case as idiosyncratic nor its analysis of the general body of Indian law can withstand scrutiny. The Narragansett Tribe's relationship with the State of Rhode Island reflects a familiar history. The majority's application of tribal sovereign immunity in this case is incompatible with Supreme Court precedents. For these reasons, I join Judge Torruella in dissenting. I write separately to elaborate on my disagreement with the majority's analysis.

A. A Common Fact Pattern

This is not an "idiosyncratic" case based on a "unique relationship." The history of litigation and legislation outlined in the majority opinion is prototypical of that involving several tribes, especially in the East but also in parts of the West. The Narragansetts, like many of these tribes, brought suit in the 1970s to contend that their ancestral lands had been alienated in violation of the Indian Non-Intercourse Act, 1 Stat 137 (1790) (codified as amended at 25 U.S.C. § 177 (2000)). *See, e.g., Oneida County v. Oneida Indian Nation of New York,* 470 U.S. 226, 229-30 (1985) (recounting litigation in New York); *Miccosukee Tribe of Indians of Florida v. Florida,* No. 79-253-CIV-JWK (S.D. Fla. 1979); *Mohegan Tribe of Indians v. Connecticut,* C.A. No. H-77-434 (D. Conn. 1977). Rhode Island, like

several other states, decided to agree to certain of the Tribe's demands, rather than to tolerate the depressed property values that had resulted from the Indians' claims. *See, e.g.*, 25 U.S.C. § 1772 (detailing "agreement" between Florida and Seminole Tribe, intended to resolve clouded land titles); 25 U.S.C. § 1771 (same re: Massachusetts and Wampanoag Tribe); 25 U.S.C. § 1774 (same re: New York and Seneca Nation). And, as it did in resolving other disputes between states and tribes, Congress enacted legislation to seal the deal. *See generally* 25 U.S.C. §§ 1701, 1721, 1741, 1751, 1771, 1772, 1773, 1774, 1775 (discussing Congressional role in resolving disputes in Rhode Island, Maine, Florida, Connecticut, Massachusetts, Washington State, and New York). What the majority says about sovereign immunity in this case has implications for the application of sovereign immunity in these similar contexts. The majority's treatment of tribal sovereign immunity will not be limited to the facts of this case.

B. Sovereignty and Sovereign Immunity

The concept of tribal sovereign immunity derives, of course, from the more general concept of tribal sovereignty. *See Blatchford v. Native Village of Noatak,* 501 U.S. 775, 782 (1991) (explaining that Indian tribes are sovereign entities, subject to the control of the federal government but not the states); *United States v. James,* 980 F.2d 1314, 1319 (9th Cir. 1992) ("Tribal immunity is just that: sovereign immunity that attaches to a tribe because of its status as a dependant domestic nation."). But the two doctrines are not interchangeable. In a recent decision, we described the distinction between sovereignty and sovereign immunity as "subtle but important." *Aroostook Band of Micmacs v. Ryan,* 404 F.3d 48, 68 (1st Cir. 2005). We noted that when a tribe asserts its sovereignty, it is claiming, "in essence, that it is not subject to state laws . . . *at all.*" *Id.* On the other hand,

we said, "tribal sovereign immunity means that [a tribe] is not amenable to *state judicial or quasi-judicial proceedings* to enforce those laws," even if the tribe is bound to observe them. *Id.*

The majority now overrules *Aroostook* "with respect to the distinction in question." However, there are several Supreme Court cases in which a tribe has been held immune from suit even though it was subject to state law. Indeed, the case the majority cites for its rejection of the distinction in *Aroostook*, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512-13 (1991), distinguished between tribal sovereignty and tribal sovereign immunity exactly as the panel did in *Aroostook*. In *Oklahoma Tax Comm'n*, the Supreme Court concluded that an Indian tribe in Oklahoma lacked any sovereign authority to sell tax-free cigarettes on its lands. Even so, the Court reasoned, the tribe's sovereign immunity remained intact, and Oklahoma could not sue the tribe to collect wrongfully withheld taxes. More recently, in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754-55 (1998), the Court emphasized the same distinction. That case also involved a situation in which an Indian tribe had flouted state contract law but could not be sued in state court for a remedy. "There is a difference," the Court observed in *Kiowa Tribe*, "between the right to demand compliance with state laws and the means available to enforce them." *Id.* at 755. This "difference" is the precise distinction noted by the panel in *Aroostook*, and it is exactly the difficulty that the majority overlooks in this case. The State's actions here cannot be approved solely by virtue of the State's substantive authority to demand the Tribe's compliance with the cigarette tax laws. *Oklahoma Tax Comm'n* could not have been clearer on that point.

I accept that the Tribe never had any authority to "market an exemption from state taxation to persons who would normally do their business elsewhere," and so was bound to assist the State in its collection of cigarette taxes. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980). I acknowledge, as I explain below, that in agreeing to the language later embodied in section 1708(a), the Tribe could no longer shield its own members from state prosecution for offenses committed on tribal lands. I will even assume, without deciding, that the majority is correct that the Tribe's sovereign autonomy is now limited largely to "matters of local governance." Maj. Op. at 26 (quoting *Rhode Island v. Narragansett Indian Tribe* 19 F.3d at 701). None of this changes the fact that the Tribe's sovereign immunity still extends, unless specifically limited, to "governmental or commercial activities . . . on or off a reservation." *Kiowa Tribe*, 523 U.S. at 760. A tribe's sovereign authority and its sovereign immunity simply are not coterminous.

The majority also questions whether tribal sovereign immunity serves as a defense to the execution of a search warrant. At its core, tribal sovereign immunity protects a tribe from a lawsuit. *See Kiowa Tribe of Oklahoma*, 523 U.S. at 754 (holding that tribe's sovereign immunity prevented lawsuit to collect on promissory note). But sovereign immunity also provides a defense to the efforts of states to enforce their criminal law against tribes. *See Puyallup Tribe v. Department of Game*, 433 U.S. 165, 171, 172-73 (1977) (allowing enforcement "analogous" to criminal prosecution against individual tribal members, but barring the state from using the same measures against a tribe itself); *see also James*, 980 F.2d at 1319-20 (recognizing that tribal sovereign immunity required quashing a criminal subpoena directed to Indian tribe). Since a tribe's sovereign immunity protects it from a state's civil suit to recover

cigarette taxes, *see Oklahoma Tax Comm'n,* 498 U.S. at 513, and also provides protection in situations "analogous" to criminal prosecutions, tribal sovereign immunity is implicated when a state uses its criminal process to seize, from the Tribe itself, cigarettes that do not have tax stamps.

C. Waiver and Abrogation of Tribal Sovereign Immunity

1. "Force and Effect"

In addressing whether the Tribe's sovereign immunity is intact, which it does despite disavowing the importance of the question, the majority focuses on language in the JMOU stating that the laws of Rhode Island would apply in "full force and effect," and a similar statement in the Settlement Act providing that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." There is no other provision about jurisdiction in either document. I find the majority's analysis of this language unconvincing. Congress has used this language for half a century to confer state jurisdiction over individual Indians on tribal lands. Both before and since the JMOU and Settlement Act, the Supreme Court consistently has held that such language-however categorically stated-does not waive or abrogate tribal sovereign immunity.

As best as I can tell, the language of the JMOU and Settlement Act originated in 1953's Public Law 280, where Congress provided for state "jurisdiction" to exist "to the same extent" and for the state laws to have "the same force and effect" on affected Indian lands as on non-Indian lands.[10]

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[10] Public Law 280 gave state courts criminal jurisdiction over all Indian country in California and Nebraska, and most Indian country in Minnesota, Oregon, and Wisconsin, and allowed states to assert jurisdiction over many other Indian lands without tribal consent. The

(. . . cont'd)

Two years before Congress adopted the Settlement Act, the Supreme Court expressly rejected the contention that this conferral of "jurisdiction" by the "force and effect" provision had abrogated or waived tribal sovereign immunity. In *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976), the Court stated in plain language that "there is notably absent [in Public Law 280] any conferral of state jurisdiction over the tribes themselves." The next year, the Supreme Court reiterated that the categorical grant of jurisdiction in Public Law 280 did not contain any abrogation of tribal sovereign immunity. *See Puyallup Tribe*, 433 U.S. at 172-73. Nine years later, in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1986), the Court repeated the conclusion in *Itasca County* and rejected a suggestion that Public Law 280 could provide an escape from tribal sovereign immunity. "We have never read Pub. L. 280," the Court said, "to constitute a waiver of tribal sovereign immunity." *Id.* at 892. *See also California ex rel California Dep't of Fish and Game v. Quechan Tribe of Indians*, 595 F.2d 1153, 1156 (9th Cir. 1979) (explaining why Pub. L. 280's extension of state jurisdiction over tribal lands did not subject the tribe to suit by the state to enforce state criminal laws).

As the majority says, "we must presume that Congress acts with knowledge of relevant Supreme Court precedent." If we are to apply this maxim to an interpretation of section 1708(a), the most relevant precedents are *Itasca County*,

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(Cont'd . . .)
criminal jurisdiction provision in the law provides that relevant states shall have jurisdiction over offenses committed by or against Indians in the [relevant] areas of Indian country . . . to the same extent that such State has jurisdiction over offenses committed elsewhere within the state, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State.

which was decided just two years before Congress adopted § 1708(a), and *Puyallup Tribe*, enacted just one year before. If Congress had wanted to abrogate the Tribe's sovereign immunity in 1978, it would not have done so by repeating language that the Supreme Court had held in each of the previous two years did not result in "any conferral of state jurisdiction over the tribes themselves." *Itasca County*, 426 U.S. at 389. This is especially so because, when it acted, Congress knew very well that the statute it produced would be "liberally construed, doubtful expressions being resolved in favor of the Indians." *Id.* at 392 (internal quotation marks omitted).

Nor do I understand how the "force and effect" language constituted a waiver of the Tribe's sovereign immunity when it appeared in the Tribe's JMOU with the State. The Tribe could not have understood that it was waiving its sovereign immunity to suit by the State by agreeing that its lands — like the lands of so many other tribes — would be under the criminal authority of the State. Instead, the Tribe bargained for a relationship with State law enforcement that would mirror the relationship in dozens of places around the country, where the "force and effect" of a state's criminal jurisdiction did not impair tribal sovereign immunity. In short, in preparing the JMOU and the Settlement Act, Congress, the State, and the Tribe all understood that the language they had chosen could not abrogate a tribe's sovereign immunity.[11] Surely, if a waiver of tribal sovereign

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[11] The majority claims that, because this case is "idiosyncratic," we can ignore the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1725(a) & (d), which was adopted in 1980 and contains explicit abrogations of tribal sovereign immunity. In the Maine act, Congress made clear that certain "Indian nations, or tribes or bands of Indians" would be "subject to the civil and criminal jurisdiction of the State." 25 U.S.C. § 1725(a). Congress also explicitly provided for all Maine tribes to "sue and be sued

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immunity really was "the State's most important quid pro quo" — as the majority insists, without citation to any historical document — the State would have demanded different language.[12]

Accepting the majority's contention that the Settlement Act contains a broader conferral of substantive jurisdiction than Public Law 280 does not change anything. I do not suggest that the Settlement Act and Public Law 280 serve identical purposes. I aver only that the parties to the JMOU and Settlement Act borrowed language from Public Law 280 at a time, and in a manner, that does not evince any intent to subject the Tribe itself to the criminal processes of the State. No matter how broadly the majority construes section 1708(a)'s jurisdictional language, the majority cannot point to anything in that section, in the broader Act, in the JMOU, or in the history underlying those documents, that even suggests any agreement that the Tribe itself could be made a party to state court process involuntarily.[13]

(Cont'd . . .)

. . . to that same extent as any other entity or person residing in the State of Maine." 25 U.S.C. § 1725(d). Contrary to what the majority suggests, that statute-which speaks precisely to the question of tribal sovereign immunity-adds considerable doubt to any assertion that Congress intended to abrogate Narragansett tribal immunity in the nearly contemporaneous but very differently-worded Settlement Act.

[12] In reality, the Congressional findings of fact that accompanied the Settlement Act indicate that the State's most important "quid pro quo" was the Tribe's agreement not to institute any further land claims suits, so that "clouds on titles" would be removed, and the "severe economic hardships" born by non-Indians who held lands near the contested area would end. *See* 25 U.S.C. §§ 1701(b), (c).

[13] The majority places substantial reliance on the Supreme Court's statement in *C & L Enterprises v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001), that "talismanic" phrases are not required to effectuate a tribal waiver of sovereign immunity. The cases applying *C*

(. . . cont'd)

There is another reason to doubt the majority's reading of the Settlement Act and JMOU, and another reason we can be sure that this is not an "idiosyncratic case." The phrases that the majority uses to find an abrogation and waiver of the Tribe's sovereign immunity have become widely-used terms of art, well known to extend jurisdiction over individuals on tribal lands without affecting the sovereign immunity of tribes themselves. Identical or similar phrasing has been commonly part of agreements between states and tribes, and the Congressional legislation that validates them. Many of the Eastern tribes that have regained their sovereign rights through the combination of negotiated agreement and statutory provision that I sketched above possess their lands subject to language remarkably similar to language that the majority analyzes here. *See*, e.g., 25 U.S.C. § 1775d ("The criminal laws of [Connecticut] shall have the same force within [the Mohegan tribe's] reservation and Indian country as such laws have elsewhere in the State."). Other tribes around the country hold their lands subject to 25 U.S.C. §§ 1321 and 1322 — the modern-day version of Public Law 280, enacted in 1968 — which allow states and tribes to agree that certain tribal lands will fall under state jurisdiction. Again, the wording is nearly identical to that at issue here. *See* 25 U.S.C. § 1321 (providing that, upon agreement, the

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& L have recognized that a waiver of sovereign immunity requires some reference to the tribe itself (rather than to its lands or members). *See, e.g., Building Inspector and Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 818 N.E.2d 1040, 1048-49 (Mass. 2004) (holding that even though specialized phrasing was not employed, tribe clearly waived its sovereign immunity from zoning enforcement by agreeing to hold the relevant lands "in the same manner . . . as any other Massachusetts corporation"). The problem here is not a choice of language, but the lack of *any* language in *any* of the relevant documents that speaks to jurisdiction over the Tribe.

state's "jurisdiction [will apply] to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State," and that the "the criminal laws of [the State] shall have the same force and effect within such Indian country or part thereof as they have elsewhere within the State"); 25 U.S.C. § 1322 (similar in civil context). Given this array of laws, I see no way to limit the majority's abrogation of the Tribe's sovereign immunity, so that it does not also call into question the sovereign immunity claimed by the many tribes that hold lands brought under state jurisdiction by the several settlement acts or 25 U.S.C. §§ 1321-22.[14]

2. The Maynard case

We already have held that the Settlement Act and JMOU did not constitute an abrogation or waiver of the Tribe's sovereign immunity. *Maynard v. Narragansett Indian Tribe,* 984 F.2d 14 (1st Cir. 1993). In *Maynard,* we correctly stated that any "waiver or abrogation" of tribal sovereign immunity would have to be "infer[red]" from the settlement documents. *Id.* at 16. But such waivers cannot be inferred. Congressional abrogation of tribal sovereign immunity must be "unequivocal[ ]" to be effective, and a tribe's waiver of its immunity from state court process must be "clear." *C & L Enterprises,* 532 U.S. at 418 (internal quotation marks omitted).

As an en banc court, we have the authority to discard precedents. But I disagree with any suggestion that today's

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[14] The majority places great emphasis on the fact that the State's jurisdiction over the Tribe's lands was "based on 'the mutual consent of all parties,'" Maj. Op. at 28 (quoting H.R. Rep. No. 95-1143, at 11). But this fact does not distinguish this case from the run of the mill. The mutual consent of all the involved parties underlies each of these post-1968 conferrals of jurisdiction over Indian lands.

holding can be squared with *Maynard*. The majority says that *Maynard* is inapposite here because this is not a "civil suit premised on activities occurring outside the settlement lands." As I have explained above, however, the same sovereign immunity that protects a tribe from civil lawsuits also protects it from criminal process. If anything, there is a stronger rationale for recognizing the Tribe's sovereign immunity here than in *Maynard* because, while *Maynard* involved an injunctive suit to stop the Tribe's purported interference with a private landowner's activities on his own lands, this case involves the State's effort to execute its process on tribal lands. *See Kiowa Tribe*, 523 U.S. at 763-64 (Stevens, J., dissenting) (noting that tribal sovereign immunity has a stronger basis when applied to quash actions relating to activities on tribal lands). In short, *Maynard* cannot be distinguished to reach the result of the majority opinion. It must be overruled. Regrettably, the majority has done just that. *Maynard*'s analysis of the Tribe's sovereign immunity was correct.

D. Surplusage

The majority is simply wrong that "section 1708(a) would be mere surplusage if, as the Tribe contends, it contemplates no more than that the State may exercise jurisdiction within the settlement lands subject to the constraints of tribal sovereign immunity." The majority says that "[a]t the time Congress passed the Settlement Act, the Supreme Court already had adopted the approach of permitting the exercise of state jurisdiction within Indian lands where the exercise of such jurisdiction had not been preempted by federal law." This statement reflects a basic misunderstanding of Indian law.

At the time Congress adopted the Settlement Act, as now, a state not expressly granted jurisdiction over Indian lands by Congress, pursuant to Public Law 280, 25 U.S.C. §§ 1321-

22, 18 U.S.C. § 1162, or another similar statute, lacked criminal or civil jurisdiction over individual Indians who committed crimes on those lands. *See, e.g., Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990) (recognizing that in the absence of an express Congressional grant of jurisdiction, a state law enforcement officer has no authority to arrest an individual Indian for a criminal offense committed on Indian land); *United States v. Daye*, 696 F.2d 1305, 1307 (11th Cir. 1983) (same). *See also Williams v. Lee*, 358 U.S. 217, 220 (1959) ("[S]tate courts have been allowed to try non-Indians who committed crimes against each other on a reservation. . . . But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive.").

That is also the state of the law now. No Supreme Court case authorizes a state to extend its criminal court processes by preemption to conduct committed by individual Indians on Indian lands. The majority's reliance on *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 172 (1973), for the proposition that Rhode Island needed neither Congressional authorization nor the Tribe's approval to exercise such jurisdiction over the Tribe's lands, is misguided. The *McClanahan* Court expressly rejected an approach that would allow states to exercise jurisdiction over Indians on tribal lands on their own initiative. Rather, the Court said, Congress has made it clear that states cannot exert jurisdiction over Indians on Indian lands — not to mention Indian tribes — "unilaterally." *Id.* at 178. Indeed, *McClanahan* routinely is cited for precisely the opposite of the majority's proposition. The case stands for the nearly irrebuttable presumption that a state cannot extend its jurisdiction to activities conducted by individual Indians, on their tribal lands, without an express grant of authority by Congress. *See Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125-26 (1993).

If there had been no section 1708(a) or similar express conferral of criminal jurisdiction, the State would not have been able to prosecute a crime committed by an Indian on the Settlement Lands. Any such crime would have been prosecuted in tribal or federal court. *See* 18 U.S.C. §§ 1152-1156. That is the way things are done, to this day, on many Western reservations over which no state ever has been granted jurisdiction. *See, e.g., State v. Eagle Speaker*, 4 P.3d 1 (Mont. 2000) (recognizing that indictment for theft must be dismissed because the state lacked jurisdiction to prosecute an individual Indian who had committed a crime within a reservation).[15] Congress knew when it promulgated section 1708(a) that states lack criminal jurisdiction over *individual* Indians in Indian country absent an express conferral of jurisdiction by Congress. Section 1708(a), which undoes this baseline rule, is not mere "surplusage" if it does not abrogate the Tribe's sovereign immunity.

E. Ex parte Young

As Judge Torruella indicates, the State had options for enforcing its cigarette tax laws that would have been compatible with the Tribe's sovereign immunity. For example, the State could have sought an injunction, pursuant to *Ex parte Young*, 209 U.S. 123 (1908), against the tribe's Chief Sachem and any other relevant official, for violating the federal law giving Rhode Island the ability to tax cigarette sales on the settlement lands.

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[15] *Nevada v. Hicks*, 533 U.S. 353 (2001), does not change this principle in the least. *Hicks* merely clarified that a tribal court did not have jurisdiction over an Indian's tort claim against *non-Indian* defendants. The conduct subject to the tort claim in *Hicks*, moreover, was a state's prosecution of an individual Indian for *off*-reservation conduct. *See id.* at 358-59; *id.* at 375 (Souter, J., concurring).

In *Oklahoma Tax Comm'n*, a case involving cigarette tax enforcement, the Supreme Court explicitly left open the *Ex parte Young* door. 498 U.S. at 514. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Court allowed a suit to enjoin enforcement of a purportedly illegal tribal ordinance to proceed against a tribal official, even though tribal sovereign immunity barred the same suit against the tribe itself. *See id.* at 59. *See also Puyallup Tribe*, 433 U.S. at 173. The extension of the *Ex parte Young* doctrine to tribal officials is well established in the courts of appeals as well. The Ninth Circuit has endorsed the idea categorically. *See Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1159-60 (9th Cir. 2002) (recognizing that "suits against [tribal] officials allegedly acting in contravention of federal law" are "permitted"). The Eighth Circuit has recognized that state *Ex parte Young* suits against tribal officials are available with "mutuality" to the same extent as tribal *Ex parte Young* suits against state officials. *See Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253, 256-57 (8th Cir. 1995). The Eleventh Circuit has held similarly. *See Tamiami Partners v. Miccosukee Tribe of Florida*, 63 F.3d 1030, 1050-51 (11th Cir. 1995).

Here, nothing barred the State from taking the *Ex parte Young* route. The search warrant was issued on the first day the tribal smoke shop opened. The search happened two days later. The officer who swore out the search warrant admitted that he had known for weeks about the Tribe's plans to sell tax-free cigarettes. An action for injunctive relief could have addressed the State's concerns (this was not a case where the State was seeking to recoup a large sum in uncollected taxes). Further, an *Ex parte Young* action would have placed this matter in federal court at the outset, where it could have been decided in peaceful fashion, according to the federal law principles that govern Indian law. Instead, the State encroached upon the Tribe's sovereign immunity with

its unwise and unlawful resort to criminal process and seizure of tribal property.

F. Conclusion.

In *Kiowa Tribe,* the Supreme Court confronted a situation similar to this one. Frustrated by its inability to enforce in court a valid contract it had negotiated with an Indian tribe, a corporation asked the Court to limit tribal sovereign immunity because it was incompatible with substantive obligations to which the tribe had agreed. The Court acknowledged that the tribal sovereign immunity doctrine might be incompatible in some instances with modern tribal business endeavors. *See Kiowa Tribe,* 523 U.S. at 757-58. Still, the Court refused to overrule its precedents on tribal sovereign immunity, and it rejected any suggestion that tribal sovereign immunity should only apply in matters relating to a tribe's "core group of sovereign functions." Maj. Op. at [17a]. Noting that "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests" involved in any new limitations on tribal sovereign immunity, the Court warned that "the capacity of the Legislative branch to address the issue by comprehensive legislation counsels some caution by us in this area." *Kiowa Tribe,* 523 U.S. at 759.

The majority ignores this warning and takes the opposite course. Casting aside our own precedents, it construes tribal sovereign immunity not as the Supreme Court has explained it, nor as the Tribe and State must have understood it, but in a constrained fashion that the majority believes makes sense in this case. This is a misguided effort. As the Supreme Court has repeatedly articulated the doctrine, the law of tribal sovereign immunity shielded the Tribe from the State's criminal process.

I respectfully dissent.

TORRUELLA, *Circuit Judge* (Dissenting).

Although I join Judge Lipez's cogent dissent, I write separately to add a few additional points of my own.

I dissent from the majority's holding because I believe that the majority ignores Supreme Court precedent — some of which is 150 years old, *see, e.g., In re Kansas Indians,* 72 U.S. (5 Wall.) 737, 760 (1866) — in two significant ways. First, it brushes aside the Supreme Court's consistent guidance that a waiver or abrogation of sovereign immunity must be unequivocal and explicit. *See, e.g., Santa Clara Pueblo v. Martínez,* 436 U.S. 49, 58 (1978) (noting that "[i]t is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed") (internal quotation marks and citations omitted). Second, even assuming *arguendo* that there was some ambiguity about whether there has been a waiver or abrogation of sovereign immunity in this case, the majority fails to take into account the so-called Indian canon of construction — i.e., that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985). This is most unfortunate, for the majority chooses to disregard a long-standing policy rule of obvious necessity and importance in the trust relationship between the United States and Indian nations. *See Choate v. Trapp,* 224 U.S. 665, 675 (1912) (noting that in the construction of a statute dealing with Indians, "doubtful expressions . . . are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, *without exception, for more than a hundred years* . . ." (emphasis added)). *See also Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 89 (1918); *Carpenter v. Shaw,* 280 U.S. 363, 367 (1930); *Choctaw Nation of*

Indians v. United States, 318 U.S. 423, 432 (1943); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 656 n.7 (1973).

With reference to the application and enforcement of state laws to Indian tribes, the Supreme Court has held in a number of instances that "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 755 (1998); *Okla. Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 513-14 (1991). The matter before this Court involves the enforcement by a state of its law against an Indian tribe *qua* tribe.

Although this case directly concerns only the Narragansett Indian Tribe (the "Narragansetts" or "the Tribe"), whose ancestral lands[16] are located in what is today part of the State of Rhode Island ("Rhode Island" or "the State"), this Court has before it a neuralgic issue of import that extends beyond this specific appeal. If the views adopted by the majority regarding the power of Rhode Island to enforce its laws directly against the Tribe *qua* tribe ultimately prevail, the concept of tribal sovereignty developed by the Supreme Court, *Montana v. United States*, 450 U.S. 544 (1981) (Indian tribes retain all sovereignty not *specifically* withdrawn by Congress), will be radically altered, and Native

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[16] In 1880, the Tribe sold all of its lands with the exception of two acres for the sum of $5,000, all in violation of the Indian Nonintercourse Act, 25 U.S.C. § 177, designed to protect Indians from being taken advantage of, and declaring void *ab initio* the sale of Indian lands to non-Indians unless previously authorized by the federal government. Since 1988, the Settlement Lands have been held in trust by the United States. *See Carcieri v. Norton*, 423 F.3d 45, 50-51 (1st Cir. 2005).

American tribal governments throughout the United States[17] may very well become irrelevant facades. *See Bryan v. Itasca County,* 426 U.S. 373, 388 (1976) (Congress did not intend, when extending civil and criminal jurisdiction of states to Indian reservations to undermine or destroy such tribal governments as did exist, or to convert the affected tribes into little more than private, voluntary organizations).

The record of this case establishes that on July 14, 2003, members of the Rhode Island State Police entered Narragansett tribal land to execute a search warrant issued by a Rhode Island state court, authorizing the search of a smoke shop located on tribal lands and owned by the Tribe. The police officers found quantities of cigarettes in the smoke shop which did not have the appropriate tax stamps affixed as required by state law, R.I. Gen. Laws § 44-20-33, and proceeded to confiscate them as contraband, *id.* § 44-20-37, after overcoming the physical resistance of various tribal officers and members who considered the actions of the State's officers a violation of the Tribe's sovereignty.

Rhode Island alleges that its actions constituted a valid exercise of its substantive and jurisdictional powers pursuant to § 1708(a) of the Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701 *et seq.* ("Settlement Act"), and Paragraph 13 of the "Joint Memorandum of Understanding

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[17] Particularly affected are other tribes subject to settlement acts. *See, e.g.,* Florida Indian Land Claims Settlement Act of 1982, 25 U.S.C. §§ 1741 *et seq.;* Mashantucket Pequot Indian Claims Settlement Act of 1983, 25 U.S.C. §§ 1751 *et seq.;* Seminole Land Claims Settlement Act of 1987, 25 U.S.C. §§ 1772 *et seq.;* Wampanoag Tribal Council of Gayhead, Inc., Indian Claims Settlement Act 1987, 25 U.S.C. §§ 1771 *et seq.;* Seneca Nation Settlement Act of 1990, 25 U.S.C. §§ 1774 *et seq.;* Aroostook Band of Micmacs Settlement Act of 1991, Pub. L. No. 102-171, 105 Stat. 1143 (1991); Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, 25 U.S.C. §§ 1775 *et seq.*

Concerning the Settlement of the Rhode Island Settlement Lands" ("JMOU").

Paragraph 13 of the JMOU, which predates the Settlement Act and was entered into in 1978, states that

> except as otherwise specified in this memorandum, all Laws of the State of Rhode Island shall be in full force and effect on the Settlement Lands.

Section 1708(a) reads as follows: Except as otherwise provided in this Act, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.

The State points to the language of the JMOU for support of its contention that the Tribe has waived its tribal sovereignty and immunity. It also argues that in any event, the language of the Settlement Act demonstrates unequivocally that Congress has abrogated tribal sovereign immunity. During oral argument, the State further expanded its position, claiming that by virtue of these provisions the Narragansetts relinquished all claims to tribal sovereignty and immunity and retained no semblance or residue of sovereignty or immunity that could be validly interposed by the Tribe *qua* Indian tribe against the actions of Rhode Island.

The majority seizes upon this argument by the State to rule upon an issue that, according to the law of this case, is not before us.[18] I choose to overlook this error by the

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[18] More specifically, this Court, in granting the petition for en banc, withdrew only Parts II(D)(3) and (4) of the original panel opinion. This left intact all the other parts of the opinion, including Part II(D)(1) of the panel opinion, where the panel held that the Tribe's sovereign immunity remained intact despite the grant of jurisdiction to the State. This conclusion, therefore, remains the "law of the case." *See* majority

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majority because the merits of the issue ultimately make the point irrelevant. It is nevertheless symptomatic of the manner in which the majority runs roughshod over Supreme Court and First Circuit precedent to reach its desired outcome.

It is essential to understand that but for a valid waiver or abrogation of tribal sovereignty, the State's enforcement actions against the Tribe *qua* tribe were illegal. Consequently, the key issue in this case is determining whether there has been any such waiver or abrogation.

It is clear that when tested against long-standing principles of Indian law, the sweeping asseverations made by the State regarding waiver and abrogation are lacking in substance. Tribal sovereignty, and concomitantly, tribal sovereign immunity, may not be stripped from an Indian tribe by statutory silence or by inference extracted from ambiguous language:

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers . . . [Although] [t]his aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress[,] . . . without congressional authorization, the Indian Nations are exempt from suit. It is settled that a waiver of sovereign immunity cannot be implied but must be *unequivocally expressed.*

(Cont'd . . .)
opinion at 21 n.3 (noting that because the en banc court, in granting rehearing, chose not to revisit the issue of whether the Tribe must comply with the State's cigarette tax scheme when selling cigarettes on the settlement lands, the panel's original holding on that issue remained intact and therefore became the law of the case).

Santa Clara Pueblo, 436 U.S. at 58 (emphasis supplied) (internal quotation marks and citations omitted). *See also Kiowa*, 523 U.S. at 754 ("As a matter of federal law a tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."); *Montana*, 450 U.S. at 544 (Indian tribes retain all *sovereignty* not *specifically* withdrawn by Congress).

It is "[w]ith these considerations of 'Indian sovereignty . . . [as] a backdrop against which the applicable . . . federal statut[e] must be read'". *Santa Clara Pueblo*, 436 U.S. at 60 (citing *McClanahan*, 411 U.S. at 172). I have searched exhaustively for any language unequivocally expressing the waiver or abrogation of tribal sovereignty (or the included tribal sovereign immunity) in either the JMOU or § 1708(a), but alas no such provision is to be found. In fact, neither the term "tribal sovereignty" nor "tribal sovereign immunity" are even mentioned in either stipulation. Such tombstone silence can hardly be considered an "unequivocal expression" indicating that either a waiver or an abrogation has taken place.

Although the lack of such specificity makes any search of the legislative history unnecessary and irrelevant, *In re Rivera Torres*, 432 F.3d 20, 32 (1st Cir. 2005) (Torruella, J., concurring), in an abundance of caution I have also looked for any language indicative of Congressional abrogation of these tribal rights in the scant legislative history of the Settlement Act that is available. Again, I have come up empty-handed. The House Report that accompanied the Settlement Act is silent on the subject of either tribal sovereignty or tribal sovereign immunity, much less of language specifically abrogating those rights. *See* H.R. Rep. 95-1453, 1978 U.S.C.C.A.N. 1948.

What § 1708 means is that the State's laws and jurisdiction apply within the tribal lands to *individuals*, both

Indians and non-Indians, and also that those laws can be enforced against those *individuals*. *Nevada v. Hicks*, 533 U.S. 353 (2001). Were § 1708(a) not in place, Rhode Island law could not be applied within tribal lands at all. *See* Title III, 25 U.S.C. §§ 1321-1326; *McClanahan*, 411 U.S. at 170-71. However, the application and enforcement of state law against individuals within tribal lands by virtue of § 1708, and actions by the state which involve the *enforcement* of those laws *directly against the Tribe qua tribe* are totally different concepts. *Kiowa*, 523 U.S. at 755. Thus, as an example, because of the doctrine of tribal sovereign immunity, a state cannot without specific Congressional approval sue an Indian tribe to collect unpaid taxes notwithstanding that those state laws may be applicable to individuals within tribal lands. *Potawatomi*, 498 U.S. at 510 (recognizing tribal immunity from suit to collect unpaid cigarette taxes). Nor, absent Congressional abrogation or waiver of tribal immunity, can an Indian tribe be sued for governmental or even commercial activities, whether conducted on or off a reservation. *Kiowa*, 523 U.S. at 754-55.

In fact, the panel sustained the validity of the state tax at issue in this case because "the legal incidence of the Rhode Island cigarette tax falls on the consumer, not the Narragansett Tribe." *Narragansett Indian Tribe of Rhode Island v. State of Rhode Island*, 407 F.3d 450, 459 (1st Cir. 2005). The panel also stated in its opinion that

> [i]f the legal incidence of the cigarette tax falls on the Tribe itself, it presents serious tribal sovereignty concerns that might preclude the State from enforcing its tax due to the United States' recognition of the Narragansetts as a sovereign Indian tribe. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-59 (1995) (citing *Moe v. Confederated Salish*

> *and Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 483 (1976)). Such a "tax cannot be enforced absent clear congressional authorization." *Chickasaw Nation,* 515 U.S. at 459.

Id. at 456.[19]

The present situation is comparable to that presented by cases and statutes involving federal enclaves in which the federal government, in addition to enforcing federal law within those enclaves, has consented to the concurrent application and jurisdiction of state laws against individuals within those lands. *See, e.g.,* Assimilative Crimes Act, 18 U.S.C. § 13(a) (assimilating into federal law, and thereby making applicable on federal enclaves such as Army bases, certain criminal laws of the state in which the enclave is located); *Lewis v. United States,* 523 U.S. 155 (1998). Such duality of jurisdiction, however, clearly does not constitute a waiver of sovereign immunity by the federal government absent a specific relinquishment by the United States, as is seen, for example, with the Federal Tort Claims Act. *See* 28 U.S.C. § 1346(b)(1) (waiving sovereign immunity with respect to certain categories of torts committed by federal employees in the scope of their employment); *FDIC v. Meyer,* 510 U.S. 471, 475 (1994); *Bolduc v. United States,* 402 F.3d 50, 55 (1st Cir. 2005).

There are further indications that no abrogation was intended by Congress by virtue of the limited language in the Settlement Act. In 1978, when Congress enacted that statute,

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[19] It should be pointed out that this ruling by the panel affirmed the district court's finding about the applicability and incidence of the tax. The panel's ruling, in turn, was affirmed by the en banc court, since, as the majority correctly notes, the panel's ruling regarding the applicability and incidence of the tax was not withdrawn by the Court's decision to grant rehearing en banc in this case.

it only provided for Rhode Island law and jurisdiction to apply in the "settlement *lands*." 25 U.S.C. § 1708 (emphasis supplied). However, only two years later when under similar circumstances it passed the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. § 1725, Congress expressly provided that the State of Maine would have jurisdiction over "all Indians, *Indian nations, or tribes* or bands of Indians . . . *and any lands* or natural resources owned by any such Indian, *Indian nation, tribe* or band of Indians and any lands or natural resources held in trust by the United States" (emphasis supplied). I cannot countenance that the omission of the "tribal" language from the Settlement Act was an unintended oversight by Congress without any purpose in mind. *See Brewster v. Gage*, 280 U.S. 327, 337 (1930) ("The deliberate selection of language so differing from that used in . . . earlier acts indicates a change of law was intended."). This rule of statutory interpretation even holds true with regard to the addition or omission of particular language *within* a given statute. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[When] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

In interpreting the Maine statute containing the express inclusion of the aforementioned "tribal" language by Congress, this Court held as recently as April 15, 2005 that the mere *threat of an investigation* by the Maine Human Rights Commission under Maine law of an alleged discrimination charge against the Micmac Tribe "constitute[d] 'enforcement'" because, in effect, such action threatened "tribal sovereignty, self-governance, and sovereign immunity," and that such an allegation was sufficient to state a federal cause of action against the State of Maine by the Micmac Tribe. *Aroostook Band of Micmacs*

v. Ryan, 404 F.3d 48, 65-66, 68 (1st Cir. 2005) (tribal sovereign immunity means that a tribe "is not amenable to state judicial or quasi-judicial proceedings to enforce those laws."). *See also Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893 (9th Cir. 2002) (holding that execution of warrant against a tribe to obtain employee records violated tribal sovereign immunity), *vacated on other grounds sub nom. Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701 (2003). If the mere threat of an investigation constituted prohibited enforcement sufficient to allow a federal cause of action to be stated alleging a violation by Maine of the Micmacs' tribal sovereignty, notwithstanding the fact that the Maine Settlement Act is incrementally more expansive in its language than the earlier enacted Rhode Island Settlement Act, what can be said of Rhode Island's infinitely more intrusive action of entering tribal lands and forcibly confiscating tribal property?[20]

What can be said is, first of all, that these are all actions directly affecting the Tribe's sovereignty *qua* tribe, for the State's invasion is a serious encroachment upon one of the most basic components of the Narragansett tribal government, *its treasury*. Furthermore, it can be said, these are extreme actions that clearly have not been authorized by any act of Congress. Applying fundamental principles of Indian law to these two propositions there should be no

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[20] The State's contention that its authority to search and seize the Tribe's property is not dependent on the search warrant because the State is independently authorized to effectuate this action pursuant to Rhode Island law, R.I. Gen. Laws § 44-20-37, is unavailing. "[T]ribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa*, 523 U.S. at 756; *see also Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 891 (1986) (same); *Wash. v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980) (same).

question but that the State's actions directed against the Tribe constituted a clear and egregious violation of its tribal sovereignty.

This is a result that is hinted at by the Supreme Court in *Wash. v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), even if not specifically decided therein. *Id.* at 162. In *Colville,* pursuant to Public Law 280, the State of Washington was granted almost identical civil and criminal jurisdiction on Colville Indian lands as in the case of Rhode Island regarding the Narragansetts' lands. Additionally, as with the Narragansetts, the Colville Tribe was selling cigarettes in a tribal shop without complying with Washington's tax stamp laws. The Court, in concluding that the State of Washington had sufficient interest in enforcing its valid tax laws to justify seizures of shipments of unstamped cigarettes as contraband while they were traveling to the reservation, stated that, "[b]y seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests." *Id.* at 162.

Rhode Island instead chose the confrontational alternative of a Rambo-like raid, totally invasive of those core tribal interests. Although "[t]here is no doubt that sovereign immunity bars [Rhode Island] from pursuing the most efficient remedy" [a lawsuit against the Tribe], this is not to say "that it lacks any adequate alternatives." *Potawatomi,* 498 U.S. at 514. Among those remedies suggested by the Supreme Court, *id.,* are the holding of individual agents or officers of the Tribe liable in actions brought by the State, *see Ex parte Young,* 209 U.S. 123 (1908); the collection of the sales tax from cigarette wholesalers by seizing unstamped cigarettes off the reservation, *Colville,* 447 U.S. at 161-62; or the assessment of wholesalers who supplied unstamped cigarettes to the tribal stores. *City Vending of Muskogee, Inc.*

v. Okla. Tax Comm'n, 898 F.2d 122 (10th Cir. 1990). Rhode Island could also "enter into agreements with the [T]ribe[ ] to adopt a mutually satisfactory regime for the collection of this sort of tax." *Potawatomi,* 498 U.S. at 514. Lastly, Rhode Island can also ask Congress for a specific abrogation of tribal sovereignty, *id.*, an endeavor which should not prove to be insurmountable considering the imbalance of political forces at stake.

What is conspicuously absent from this laundry list of alternative remedies available to the State of Rhode Island is any remedy involving the State's use of its coercive police power directly against the Narragansett Tribe itself. Rhode Island presently lacks the ability to use such powers directly against the Tribe. Accordingly, I respectfully dissent from the majority's holding to the contrary.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 04-1155

NARRAGANSETT INDIAN TRIBE,
Plaintiff, Appellant,

v.

STATE OF RHODE ISLAND, ET AL.,
Defendants, Appellees.

Before BOUDIN, *Chief Judge*, TORRUELLA, SELYA, LYNCH, LIPEZ and HOWARD, *Circuit Judges*.

ORDER GRANTING REHEARING EN BANC

Entered: July 8, 2005

A majority of the judges of this court in active service have voted to rehear en banc the questions of whether, to what extent, and in what manner Rhode Island may enforce its civil and criminal laws with respect to the operation of the Smoke Shop by the Narragansett Indian Tribe. Consequently, Parts II(D)(3) and (4) of the opinion of the panel in this case, *Narragansett Indian Tribe v. State of R.I.*, 407 F.3d 450, 463-66 (1st Cir. 2005), are *withdrawn,* as are any other portions of the panel opinion that involve the enforcement questions. The judgment of this court dated May 12, 2005, is vacated.

The parties are directed to submit supplemental briefs on the enforcement questions, including the effect (if any) of tribal sovereign immunity. These briefs shall not exceed thirty pages per side, shall be in the form required by this court's local rules, and shall be filed on or before August 31, 2005.

The court invites timely motions to file amicus briefs of up to 15 pages in length.

The en banc court will hear oral arguments on Tuesday, December 6, 2005, at 2:00 p.m.

By the Court:

/s/
Richard C. Donovan, Clerk.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 04-1155

NARRAGANSETT INDIAN TRIBE OF RHODE ISLAND,
Plaintiff, Appellant,

v.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS; DONALD L. CARCIERI, in his official capacity as GOVERNOR; PATRICK C. LYNCH, in his official capacity as ATTORNEY GENERAL; STEVEN M. PARE, in his official capacity as Colonel of the Rhode Island State Police; JUSTICES OF RHODE ISLAND DISTRICT AND SUPERIOR COURTS; TOWN OF CHARLESTOWN; CHARLESTOWN POLICE DEPARTMENT,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

[Hon. William E. Smith, *U.S. District Judge*]

Before TORRUELLA and HOWARD, *Circuit Judges*, and DiCLERICO, Jr.,* *District Judge*.

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* Of the District of New Hampshire, sitting by designation.

TORRUELLA, *Circuit Judge.*

On July 14, 2003, Rhode Island State Police executed a search warrant and confiscated inventory at a smoke shop ("the Smoke Shop") located on Narragansett tribal land. An altercation ensued between members of the Narragansett Indian Tribe ("the Tribe" or "the Narragansetts") and several State police officers, resulting in the arrest of eight tribal members, including the Chief Sachem of the Tribe.

Following this incident, both the Narragansetts and the State of Rhode Island filed suits disputing the issue of whether the Tribe's operation of a smoke shop and sale of cigarettes on the Tribe's settlement lands are exempt from the application and enforcement of Rhode Island's cigarette tax laws. The State initially filed its complaint in Rhode Island state court and the Narragansetts removed the case to federal district court in an attempt to have it decided together with the Tribe's complaint, which was brought in federal district court. The district court found that it did not have jurisdiction over the state case and remanded it to the state court. However, the district court treated the State's motion for summary judgment in its case as a motion for summary judgment in the Tribe's federal case and decided the federal case accordingly. The district court granted summary judgment in favor of the State, and the Narragansett Tribe now brings the instant appeal.

We must decide three questions related to this incident. First, we are asked whether the district court could exercise jurisdiction over the State's complaint. Second, we must decide whether the Narragansett Tribe has sovereign immunity from the Rhode Island tax on cigarettes, focusing on whether the legal incidence of the cigarette tax falls on the tribe or the consumer of the cigarettes. Finally, we must

determine whether the State exceeded its authority in the enforcement of its cigarette tax on settlement lands in violation of the Tribe's sovereignty.

I. Background

The parties submitted this case on stipulated facts, thus, "no evidence contrary to the facts stipulated can be considered." *Gómez v. Rodríguez*, 344 F.3d 103, 121 (1st Cir. 2003). We review the factual findings under the clear-error standard, and the "ultimate application of the law to those facts" remains "subject to *de novo* review." *Reich v. John Alden Life Ins., Co.*, 126 F.3d 1, 6-7 (1st Cir. 1997).

The Narragansett Indian Tribe is a federally recognized Indian tribe located in the State of Rhode Island. *See* Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (Feb. 10, 1983). The Tribe is primarily situated on 1800 acres of land known as the settlement lands, which were given to the Tribe in the Rhode Island Indian Claims Settlement Act ("the Settlement Act"), 25 U.S.C. §§ 1701-1716. The relationship between the Narragansett Tribe and the State of Rhode Island is defined, in a number of ways, by the Settlement Act. In the mid-1970s, the Narragansett Indian Tribe brought two lawsuits in which they claimed aboriginal entitlement to 3200 acres of land in Charlestown, Rhode Island. *Narragansett Tribe of Indians v. S. R.I. Land Dev. Corp.*, 418 F. Supp. 798 (D.R.I. 1976); *Narragansett Tribe of Indians v. Murphy*, 426 F. Supp. 132 (D.R.I. 1976). The Settlement Act implemented the Joint Memorandum of Understanding ("the JMOU") between the Narragansetts and the State of Rhode Island, H.R. Rep. No. 95-1453, at 25-28 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1948, 1962-66, that resolved these lawsuits. *See* H.R. Rep. No. 95-1453, at 5.

Under the terms of the JMOU and Settlement Act, the State provided 900 acres to the Narragansetts and the Federal

government agreed to provide funding for the purchase of an additional 900 acres. These lands comprise the 1800 acres we refer to as the settlement lands. In exchange for this provision of land to the Tribe, the State negotiated for and received the continued applicability of State law to the settlement lands. *See* 25 U.S.C. § 1708(a) ("Except as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.").

A. The Rhode Island Cigarette Tax Scheme

The sale of cigarettes in Rhode Island is governed by a number of statutory requirements, including taxation provisions. *See* R.I. Gen. Laws §§ 44-20-1 to 44-20-55. The State's cigarette tax scheme imposes the following requirements:

> Every person engaged in the sale of cigarettes in Rhode Island must first obtain a license from the State Tax Administrator. *R.I. Gen. Laws § 44-20-2.* In addition to this licensing requirement, Rhode Island imposes an excise tax on cigarettes sold, distributed, held, or consumed within its borders. *R.I. Gen. Laws § 44-20-12.* The tax is collected through the sale of cigarette stamps, which must be affixed to all packages of cigarettes possessed within the State (with limited exceptions). *R.I. Gen. Laws § 44-20-13, 44-20-18, 44-20-30.* State law also requires a retailer to add a sales tax to the sale price of the cigarettes. *R.I. Gen. Laws § 44-18-19.*

Narragansett Indian Tribe v. Rhode Island, 296 F. Supp. 2d 153, 163 (D.R.I. 2003). The excise tax requires that distributors

> affix tax stamps in the proper denominations at the location where their license is issued. The stamps

> may be affixed to a distributor's cigarettes at any time before transferring the possession of the cigarettes. *R.I. Gen. Laws § 44-20-28.* When a dealer receives unstamped cigarettes, he or she must affix stamps within twenty-four hours after coming into possession of the cigarettes. *R.I. Gen. Laws § 44-20-29.* . . . State law makes it unlawful to sell or possess unstamped cigarettes, see R.I. Gen. Laws §§ 44-20-35, 44-20-36, and cigarettes not bearing stamps that are not exempt are contraband and subject to seizure by the State. R.I. Gen. Laws §§ 44-20-37, 44-20-38.

Narragansett Indian Tribe, 296 F. Supp. 2d at 163.

Moreover, Rhode Island, with the assistance of the Federal government, has a system by which it collects sales taxes on cigarettes from consumers who reside in the State and purchase cigarettes from out-of-state dealers. *See* The Jenkins Act, 15 U.S.C. §§ 375-378 (requiring persons shipping or delivering cigarettes to a state that taxes the sale or use of cigarettes to comply with various reporting requirements identifying to the state the monthly cigarette shipments and the consumers who purchased them).

B. The Dispute

On July 1, 2003, the Narragansett Indian Tribe's Tribal Council passed a resolution authorizing the opening of a tribally owned Smoke Shop to sell cigarettes. The Tribe stipulated that the purpose of opening the Smoke Shop was to provide a means for economic development for the Tribal Nation. The Tribe imported unstamped cigarettes from other states and stored them in anticipation of the Smoke Shop's opening. The Smoke Shop, which opened on July 12, 2003, was located entirely within the Tribe's settlement lands. The Shop offered unstamped, untaxed cigarettes for sale to both tribal and non-tribal members without collecting Rhode Island's seven percent retail sales tax from any of its

customers. As stipulated before the court below, "a large proportion of the Shop's customers were not members of the Tribe." *Narragansett Indian Tribe*, 296 F. Supp. 2d at 158 (referencing the Joint Stipulations of the parties).

The day the Smoke Shop opened, the Rhode Island State Police sought a search warrant to search the Smoke Shop for alleged violations of Rhode Island's cigarette tax laws, specifically, the possession and sale of unstamped cigarettes, which is a misdemeanor offense. *See* R.I. Gen. Laws §§ 44-20-35, 44-20-36; *see also id.* at §§ 44-20-37, 44-20-38 (allowing for the seizure of such cigarettes as contraband). The State of Rhode Island District Court issued the requested warrant to search the Smoke Shop that same day. On July 14, 2003, Rhode Island State Police entered the Narragansett Tribe's settlement lands and executed the search warrant on the Chief Sachem of the Narragansett Indian Tribe. The State Police confiscated the Tribe's inventory of unstamped cigarettes as well as various documents and monies. An altercation ensued between the State Police and some tribal members, resulting in the arrest of the Chief Sachem and seven other tribal members.

Both the Narragansetts and the State brought suit over this incident. The district court found that it had jurisdiction over the Tribe's case, which was originally brought in federal district court. *See* 28 U.S.C. § 1362 (providing that "The [federal] district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."). However, the district court found that it did not have subject matter jurisdiction over the State's action, which was originally brought in Rhode Island State Superior Court and later removed to the federal district court by the Tribe. The

State had brought its action pursuant to Rhode Island law seeking a declaration that the Tribe's failure to comply with Rhode Island's cigarette sales and excise tax scheme was unlawful. The district court therefore remanded the State's suit back to the Washington County Superior Court, but determined that it would "treat the State's motion for summary Judgment in the State's case as a motion for summary judgment in the Tribe's action." *Narragansett Indian Tribe*, 296 F. Supp. 2d at 160 n.5.

Faced with cross motions for summary judgment, the district court granted summary judgment in favor of the State, holding that: (1) the legal incidence of the State's Cigarette Tax falls on the consumer, and not the Tribe; (2) the State did not violate federal law or the Tribe's sovereign rights when it enforced its criminal statutes by executing a search warrant, and making arrests pursuant to that warrant, on tribal land; and (3) the Tribe must comply with the Cigarette Tax if it wishes to continue selling cigarette products on the settlement lands.

II. Analysis

We review the district court's grant of summary judgment *de novo*, construing the evidence in the light most favorable to the appellant. *Fenton v. John Hancock Mut. Life Ins.*, 400 F.3d 83, 87 (1st Cir. 2005). We will uphold the grant of summary judgment if there is no genuine issue of material fact and appellees are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

A. Jurisdiction over the State's Complaint

The Tribe asserts that the well-pleaded complaint rule did not deprive the district court of jurisdiction over the State's complaint, which the Tribe removed from state court to

federal district court.[1] The federal district court determined that it did not have subject matter jurisdiction over the State's complaint because (1) the State did not bring its "claims under the Settlement Act;" (2) 28 U.S.C. § 1362 does not provide a viable basis for federal jurisdiction because it "only vests jurisdiction in a federal court over actions *brought* by an Indian tribe under the laws of the United States;" and (3) the district court found the cases cited by the Tribe in support of removal to be "unavailing and inapposite." *Narragansett Indian Tribe,* 296 F. Supp. 2d at 160.

The Tribe argues that the district court should have applied the "artful pleading rule" to the State's complaint.[2] But the alleged federal issue — whether the State has authority to tax the Tribe under the Settlement Act — is a defense. Even had it been preemptively included and argued against in the State's complaint, it would not have given rise to federal question jurisdiction over the State's complaint. *See Louisville & Nashville R.R.,* 211 U.S. at 152 (holding that the federal court lacked subject matter jurisdiction under § 1331 because the federal issue arose only fro the plaintiff's anticipation of a defense based on a federal statute).

> It is not enough that the plaintiff alleges some anticipated defense to his cause of action, and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the

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[1] Under the well-pleaded complaint rule, it must be clear from the plaintiff's complaint that there is a federal question. *Louisville & Nashville R.R. v. Mottley,* 211 U.S. 149, 152 (1908).

[2] The "artful pleading rule" bars a plaintiff from concealing a necessary federal question by omitting it from the complaint. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 22 (1983).

> litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution.

Id. Therefore, we find that the court did not err in failing to apply the artful pleading rule in this instance.

B. The Legal Incidence of the Cigarette Tax

The question of whether the legal incidence of Rhode Island's cigarette tax scheme falls on the Narragansett Tribe, as dealers of cigarettes, or merely on the consumer or non-Indian purchaser of the cigarettes, will likely determine whether the Narragansetts are required to comply with the tax scheme. The Narragansetts argue that the legal incidence of Rhode Island's cigarette tax falls directly on the Tribe and its members, and that the tax may not be enforced against the Tribe without express congressional authority. The State, on the other hand, argues that the legal incidence of the cigarette tax, as stated in the language of the Rhode Island statute, rests on the consumer rather than the Tribe. *See* R.I. Gen. Laws § 44-20-53 ("All taxes paid in pursuance of this chapter are conclusively presumed to be a direct tax upon the retail consumer, precollected for the purpose of convenience and facility only.").

If the legal incidence of the cigarette tax falls on the Tribe itself, it presents serious tribal sovereignty concerns that might preclude the State from enforcing its tax due to the United States' recognition of the Narragansetts as a sovereign Indian tribe. *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458-59 (1995) (citing *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 483 (1976)). Such a "tax cannot be enforced absent clear congressional authorization." *Chickasaw Nation,* 515 U.S. at 459.

The district court determined that the legal incidence of Rhode Island's cigarette tax falls on the consumer and not the Narragansett Tribe, noting that the pass through provision in Rhode Island's statute was plain. *Narragansett Indian Tribe,* 296 F. Supp. 2d at 167. The district court stated that "[w]hile the Supreme Court has held that a t x scheme does not need to contain such an express statement to place the legal incidence of the tax on the consumer, the Court has enforced such provisions when they are present." *Id.*

In adjudicating matters of state law, federal courts ordinarily defer to the decisions of state courts. For example, in *Gurley v. Rhoden,* 421 U.S. 200 (1975), a gasoline retailer claimed that because the legal incidence of the state's gasoline excise tax fell on his consumers and he therefore merely collected the tax for the state, due process entitled him to deduct the state tax from the amount of his sales which were subject to a state sales tax. The Mississippi Supreme Court held that the legal incidence of the excise tax fell on petitioner. In deciding *Gurley,* the Supreme Court observed that "a State's highest court is the final judicial arbiter of the meaning of state statutes," and said that "[w]hen a state court has made its own definitive determination as to the operating incidence, . . . [w]e give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." *Id.* at 208 (citing *American Oil Co. v. Neill,* 380 U.S. 451, 455-56 (1965)).

The Narragansett Tribe cites *Gurley* as the basis for its argument that the district court should not have made an independent determination of the legal incidence under Rhode Island law. Rather than making an independent determination, the Tribe contends, the district court should have given great weight to *Daniels Tobacco Co. v. Norberg,*

114 R.I. 502, 506 (1975), a Rhode Island State Supreme Court decision regarding the legal incidence of the cigarette tax. *Daniels* involves a ruling by the Rhode Island State Tax Administrator ordering a distributor to pay the taxes due on cigarettes and tobacco products that were stolen prior to sale. The distributor appealed the decision in state courts, arguing that as a distributor he should not be liable for the imposition of the cigarette tax on the stolen cigarettes because R.I. Gen. Laws § 44-20-12 does not make a distributor liable for the cigarette tax, and furthermore, R.I. Gen. Laws § 44-20-53 states that cigarette taxes are a direct tax on the consumer, precollected for convenience only. *Daniels,* 114 R.I. at 505. The Rhode Island State Supreme Court ultimately

> determine[d] that the legislative intent in enacting § 44-20-12(1) was to place the risk of loss of cigarettes on the distributor and not on the state, "noting that § 44-20-28 . . . requires a distributor to affix tax stamps to all cigarettes he distributes. In addition, the mere fact that the ultimate economic burden of a tax is one [sic] the consumer does not determine the legal incidence of the tax."

Id. at 506, 335 A.2d 636 (citing *Ferrara v. Director, Div. of Taxation,* 127 N.J. Super. 240, 317 A.2d 80 (1974)). Thus, the Tribe argues that *Daniels* establishes that the legal incidence falls on the Tribe.

However, "[i]n situations wherein federal immunity is affected by a determination as to which party to a transaction bears the legal incidence of a state tax, the federal courts 'are not bound by the state court's characterization of the tax.'" *Confederated Tribes of Colville Reservation v. State of Washington,* 446 F. Supp. 1339 (E.D. Wash. 1978), (quoting *First Agric. Bank v. Tax Comm'n,* 392 U.S. 339, 347 (1968), *aff'd in part, reversed in part,* 447 U.S. 134, 151 (1980)). Rather, in cases where courts must determine whether the

legal incidence of a tax falls on an Indian tribe, courts apply federal law. *See, e.g., Sac and Fox Nation v. Pierce,* 213 F.3d 566, 578 (10th Cir. 2000) ("For our purposes, the question of where the legal incidence of the Kansas motor fuel tax rests is one of federal law."); *see also United States v. Mississippi Tax Comm'n,* 421 U.S. 599, 609 n.7 (1974).

The Narragansett Tribe argues that the district court should not have applied federal law. Citing *Kern-Limerick, Inc. v. Scurlock,* 347 U.S. 110 (1954), the seminal Supreme Court case underpinning *Gurley* and other tax incidence cases, the Tribe notes that the Supreme Court instructs federal courts to defer to state courts on questions of where the incidence of a state tax falls, unless the case involves "federal constitutional issues." *Id.* at 121. The Tribe asserts that the "federal immunity" at issue in *Kern-Limerick* does not encompass tribal immunity because, the Tribe argues, tribal sovereignty does not arise under federal or constitutional law, but rather from the inherent sovereignty of the Tribe. The Narragansetts point to *United States v. Lara,* 541 U.S. 193 (2004), as confirming that tribal sovereignty does not arise under the Constitution or federal law. *Lara* involves a double jeopardy claim brought in light of recent congressional legislation that authorizes Indian tribes to prosecute members of other Indian tribes. The resolution of this claim hinged on whether there was dual sovereignty, leading the *Lara* court to consider whether the source of the power to punish nonmember Indian offenders is "inherent *tribal* sovereignty" or delegated *federal* authority. *Id.* at 1632. The Supreme Court determined that "Congress intended the former" because "the statute says that it 'recognize[s] and affirm[s]' in each tribe the 'inherent' tribal power (not delegated federal power) to prosecute nonmember Indians for misdemeanors" and because "the statute's legislative history confirms that such was Congress' intent." *Id.* at 1632-33. Based on this logic, the Tribe asserts that

federal courts must look first to an existing interpretation of state law by the state's highest court in cases such as the instant case.

The Tribe, however, ignores Supreme Court precedent to the contrary. For example, in *Kiowa Tribe v. Manufacturing Technologies, Inc.*, the Supreme Court stated that "[l]ike foreign sovereign immunity, tribal immunity is a matter of federal law." 523 U.S. 751, 759 (1998). The Tribe also ignores the Supreme Court's precedent where the Court accepted a district court's use of federal law in determining whether the legal incidence of the Washington tax fell on the Indian tribe over the state court's interpretations. *See Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 142 (1980); *California State Bd. of Equalization et al. v. Chemehuevi Indian Tribe,* 474 U.S. 9, 11 (1985) (explicitly reiterating that the Court accepted the district court's conclusion that the legal incidence of Washington state's cigarette tax fell on purchasers). In addition, other courts have consistently applied federal law in deciding whether the legal incidence of a state tax falls on a sovereign Indian tribe. *See, e.g., Sac and Fox Nation,* 213 F.3d at 578 (noting that "the question of where the legal incidence of the Kansas motor fuel tax rests is one of federal law" in a case regarding whether the State of Kansas could impose its tax on fuel distributed to tribally owned and operated retail stations located on Indian lands within the State) (citing *United States v. Mississippi Tax Comm'n,* 421 U.S. 599, 609 n.7 (1975)); *Kern-Limerick,* 347 U.S. at 121-22; *Coeur D'Alene Tribe v. Hammond,* 384 F.3d 674, 681 (9th Cir. 2004) ("The incidence of a state tax on a sovereign Indian nation inescapably is a question of federal law that cannot be conclusively resolved in and of itself by the state legislature's mere statement.").

Even if we were to consider the Rhode Island Supreme Court's decision in *Daniels*, it is not outcome determinative. *Daniels* predates the Supreme Court decisions, such as *Moe*, 425 U.S. at 482, that held that pass through tax provisions are dispositive as to who bears the legal incidence of a tax. In *Moe*, the Supreme Court evaluated a Montana tax statute that provided that the tax "shall be conclusively presumed to be [a] direct [tax] on the retail consumer precollected for the purpose of convenience and facility only." *Id.* (quoting Mont. Rev. Code Ann. § 84-5606(1) (1947)). The Supreme Court determined that "to the extent that the 'smoke shops' sell to those upon whom the State has validly imposed a sales or excise tax . . . the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's enforcement and collection thereof." *Id.* The Supreme Court has repeatedly affirmed that cigarette tax schemes containing pass through provisions place the legal incidence of the tax on the consumer rather than the distributor. *See Chickasaw*, 515 U.S. at 461; *Milhelm Attea*, 512 U.S. at 64; *Chemehuevi*, 474 U.S. at 11; *Colville*, 447 U.S. at 159. Therefore, the holding of *Daniels* does not persuade us that the incidence of the Rhode Island cigarette tax falls on the Narragansetts.

It is not required that the law expressly state that the tax must be passed on to the ultimate purchaser for a State to require a tribe to collect cigarette taxes from non-Indian purchasers and remit it to the State. *Chemehuevi*, 474 U.S. at 11. The Supreme Court has instructed that the test we should apply in determining whether the incidence of a state tax falls on an Indian tribe is to make "a fair interpretation of the taxing statute as written and applied." *Id.* In this case, the Rhode Island tax statute explicitly states that the cigarette taxes are "conclusively presumed to be a direct tax upon the retail consumer, precollected for the purpose of convenience and facility only." R.I. Gen. Laws § 44-20-53. As the

Supreme Court held in *Moe*, "[t]he State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." *Moe*, 425 U.S. at 483. We therefore find that the legal incidence of the Rhode Island cigarette tax falls on the consumer, not the Narragansett Tribe, and we find that the State may require the Tribe to comply with the cigarette tax in order for the State to collect the cigarette taxes that are passed on to the Tribe's non-Indian consumers.

C. Unanswered Questions

The State posits that it has raised two independently sufficient grounds on which we might affirm the district court's judgment, even if the legal incidence of the tax is found to fall on the Tribe. Since we find that the legal incidence of the tax does not fall on the Narragansett Tribe, we find it unnecessary and inappropriate to decide these questions. The grounds put forth by the State are (1) that the settlement lands are not "Indian country,"[3] and (2) that direct

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[3] Indian country is usually "the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands." *Narragansett Indian Tribe of R.I. v. Narragansett Elec. Co.*, 89 F.3d 908, 915 (1996) (quoting *Indian Country, U.S.A. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 973 (10th Cir. 1987)). Indian country is defined by Congress as including:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments. . . .

18 U.S.C. § 1151; *see Narragansett Elec. Co.*, 89 F.3d at 915. The Supreme Court has repeatedly applied this definition to issues of both

(. . . cont'd)

taxation of the Tribe by the State is allowed pursuant to both section 1708 of the Settlement Act, 25 U.S.C. § 1708(a), and the Tribe's consent,[4] implicit in its agreement to subject the settlement lands to the "full force and effect" of "all laws of the State of Rhode Island," in the Joint Memorandum of Understanding between the Narragansett Tribe and the State of Rhode Island, H.R. Rep. No. 95-1453, at 26, *reprinted in* 1978 U.S.C.C.A.N. 1948, 1964.

The Narragansetts, on the other hand, want us to declare that the settlement lands are Indian country and that the State does not have authority to tax the Tribe directly because Congress did not expressly and unequivocally consent to state taxation of the Narragansett Tribe. *McClanahan*, 411 U.S. at 177-78 (laying to rest any doubt that taxation of Indian reservation lands or Indian income from activities carried on within the boundaries of reservation lands is not permissible absent unmistakably clear congressional consent); *see also Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985); *Bryan v. Itasca County*, 426 U.S. 373, 376 (1976).

We find it unnecessary and inappropriate to decide these questions today. Because we affirm the district court's

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(Cont'd . . .)
criminal and civil jurisdiction. *Id.* at 915 (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987)).

[4] Congress has granted the consent of the United States to States wishing to assume criminal and civil jurisdiction over reservation Indians, 25 U.S.C. § 1322(a), and 25 U.S.C. § 1324 confers upon the States the right to disregard enabling acts which limit their authority over such Indians. However, "the Act expressly provides that the State must act 'with the consent of the tribe occupying the particular Indian country,' 25 U.S.C. § 1322(a), and must 'appropriately (amend its) constitution or statutes.' 25 U.S.C. § 1324." *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 177-78 (1973).

holding that the legal incidence of Rhode Island's cigarette tax falls on the consumer and not the tribal distributor, it is unnecessary for us to consider whether the tax would be valid if it were a direct tax on the Tribe.

D. Sovereign immunity and the State's enforcement of its laws on the Tribe's settlement lands

The Narragansetts claim that the State of Rhode Island exceeded its authority in enforcing its cigarette laws against the government of the Narragansett Indian Tribe and that the State thereby violated the Tribe's sovereign immunity. The State argues, conversely, that since the State's civil and criminal laws and jurisdiction apply to the settlement lands pursuant to 25 U.S.C. § 1708, the State has concomitant ability to enforce its laws there, including those governing the sale of cigarettes. The State also argues that the Tribe's sovereign immunity was abrogated by section 1708, and therefore tribal sovereign immunity does not bar the State's enforcement of its laws on the settlement lands.

The Tribe asks us to consider six distinct questions regarding the enforcement of Rhode Island's cigarette laws on the settlement lands, including (1) whether the State may invoke its jurisdiction over the settlement lands to enforce its cigarette tax on the government of the Narragansett Indian Tribe (a Land/Tribe distinction); (2) whether the State may issue and serve a search warrant for property of the tribal government; (3) whether the State may enter tribal lands to serve a warrant; (4) whether the State may confiscate Tribal government property while on the settlement lands; (5) whether the State can require the Tribe to purchase a license; and (6) whether the State was bound to use less intrusive means in order to enforce the cigarette tax.

We have determined that, since the legal incidence of Rhode Island's cigarette tax falls on the consumer, rather than the tribal distributor, the Narragansetts are obligated to

comply with the State's cigarette tax laws as they pertain to cigarettes sold to non-Indian consumers. Therefore, by selling unstamped cigarettes to non-Indian consumers, the Smoke Shop operators violated Rhode Island tax law, which is a criminal offense. This brings us to the questions regarding what measures the State may take to enforce its cigarette tax laws.

Drawing the line between the sovereign rights of the Narragansett Tribe and the State of Rhode Island is complicated by the Rhode Island Indian Claims Settlement Act, which provides for the continued applicability of Rhode Island's civil and criminal laws and jurisdiction over the settlement lands. *See* 25 U.S.C. § 1708(a). This is an ongoing and overarching question which has vexed the State and Tribe over the years as various issues have arisen. As we have stated before, all of the relevant questions cannot be answered by an all-encompassing solution. *State of Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685, 695 (1994).

1. Whether 25 U.S.C. § 1708(a) abrogates the Tribe's Sovereign Immunity on the Settlement Lands

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martínez,* 436 U.S. 49, 58 (1978) (citations omitted); *see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 508 (1991); *Bottomly v. Passamaquoddy Tribe,* 599 F.2d 1061, 1066 (1st Cir. 1979). This aspect of tribal sovereignty is subject to the "superior and plenary control of Congress." *Santa Clara Pueblo,* 436 U.S. at 58. Absent a clear, express waiver of sovereign immunity by Congress or the Tribe, suits against Indian tribes are generally barred. *Kiowa,* 523 U.S. at 755.

The Narragansett Tribe argues that its sovereign immunity is a complete defense to the State's enforcement of its cigarette laws against the Tribe. The State responds that Congress, by granting jurisdiction to the state in 25 U.S.C. § 1708, abrogated the Tribe's sovereign immunity on the settlement lands. In *Narragansett Indian Tribe,* 19 F.3d at 701, we stated that "the grant of jurisdictional power to the state in the Settlement Act is valid and rather broad. . . ." We agree with the State that this grant of jurisdictional power, in addition to the applicability of the State's civil and criminal laws, provides the State with the right, and to some extent the means, to enforce these laws on the settlement lands.

However, this does not mean that we agree with the State that Section 1708(a) abrogates the Tribe's sovereign immunity altogether. On the contrary, we have recognized and enforced the Tribe's sovereign immunity in the past. *See Maynard v. Narragansett Indian Tribe,* 984 F.2d 14, 15-16 (1st Cir. 1993). The State suggests that *Maynard* stands only for the proposition that Congress did not abrogate sovereign immunity for tribal conduct outside the settlement lands. We disagree. There is nothing in our analysis of the Settlement Act in that case which suggests that we have drawn a distinction based on where tribal activities occur. The fact of the matter is that Section 1708 does not expressly address the issue of sovereign immunity, and it would be inappropriate for us to infer that the congressional grant of jurisdiction to the State acts as a wholesale abrogation of the Tribe's sovereign immunity. It is well settled that "statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit." *Chickasaw Nation v. United States,* 534 U.S. 84, 93-94 (2001). In fact, the language of Section 1708 does not purport to waive any of the Tribe's rights.

> [T]he mere fact that the Settlement Act cedes power to the state does not necessarily mean . . . that the Tribe lacks similar power and, thus, lacks 'jurisdiction' over the settlement lands. Although the grant of jurisdictional power to the state in the Settlement Act is valid and rather broad, . . . we do not believe that it is exclusive. To the contrary, we rule that the Tribe retains concurrent jurisdiction over the settlement lands. . . .

Narragansett Indian Tribe, 19 F.3d at 701. The Tribe, therefore, retains its sovereign immunity despite the grant of jurisdiction to the State in Section 1708(a).

The Tribe's immunity does not, however, provide a complete defense to the enforcement of State laws. There remains a question of the extent to which the State may encroach upon the Tribe's settlement lands to enforce its criminal laws. Neither this Court, nor the Supreme Court, has issued definitive guidance on this question.

2. Whether the State may invoke its jurisdiction over the settlement lands to enforce its cigarette tax

The district court considered the holdings of *Nevada v. Hicks,* 533 U.S. 353 (2001), and *Colville* "in conjunction with the conferral of criminal and civil (which includes regulatory) jurisdiction contained in section 1708," and found it to be "beyond doubt that criminal law enforcement, including the seizure of contraband, on the Settlement Lands is permissible." *Narragansett Indian Tribe,* 296 F. Supp. 2d at 171. In *Hicks* and *Colville,* the Supreme Court discusses some allowable enforcement by a state concerning activities by an Indian tribe which has sovereignty and does not necessarily share jurisdiction over its tribal lands with the State. The *Hicks* Court recognized that "the principle that Indians have the right to make their own laws and be

governed by them requires 'an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.'" *Hicks*, 533 U.S. at 362 (citing *Colville*, 447 U.S. at 156). The Court offered the following guidance:

> When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, as exemplified by our decision in [*Colville*]. . . . It is also well established in our precedent that States have criminal jurisdiction over reservation Indians for crimes committed . . . off the reservation. While it is not entirely clear from our precedent whether the last mentioned authority entails the corollary right to enter a reservation (including Indian-fee lands) for enforcement purposes, several of our opinions point in that direction. In [*Colville*], we explicitly reserved the question whether state officials could seize cigarettes held for sale to nonmembers in order to recover the taxes due.

Hicks, 533 U.S. at 362-63 (2001) (citations omitted). Taking the Supreme Court's discussion of the enforcement issue in *Hicks* and *Colville*, together with Congress' grant of State jurisdiction over the settlement lands, the district court concluded that Rhode Island may enforce its criminal laws on the settlement lands, including the seizure of contraband.

The Narragansett Tribe argues that the district court came to the wrong conclusion for several reasons. First, the Tribe asserts that its sovereign immunity is a complete defense to enforcement of the State's laws on the settlement lands. The

Tribe relies heavily on a Ninth Circuit decision, *Bishop Paiute Tribe v. County of Inyo*, for the argument that even where Congress has expressly authorized a state to enforce its criminal laws, a tribe's sovereign immunity bars service of a search warrant against the tribe itself. 291 F.3d 549, 567 n.6 (9th Cir. 2002) ("[T]he search warrant was executed against the tribes in order to obtain information as part of a criminal investigation against individual Indians. . . . [T]he officers had authority to enforce criminal law against individual Indians under Public Law 280, but did not have authority to enforce those criminal laws against tribes as sovereign entities."). However, this decision is not valid precedent, as the Supreme Court vacated and remanded the decision, stating:

> The Tribe has not explained, and the trial and appellate courts have not clearly decided, what prescription of federal common law, if any, enables the Tribe to maintain an action for declaratory relief establishing its sovereign right to be free from state criminal processes. This case is therefore remanded for focused consideration and resolution of that jurisdictional question.

Inyo County v. Paiute-Shoshone Indians, 538 U.S. 701, 702 (2003).

Second, the Narragansetts argue that we should not rest our decision on *Colville,* because the Supreme Court did not decide the question of state encroachment onto tribal lands to seize cigarettes in that case. The Court refused to express an opinion on the question of whether the state may enter onto a reservation and seize stocks of cigarettes which are intended for sale to non-Indian purchasers. *Colville,* 447 U.S. at 162.

The Court did, however, determine that the State of Washington's interest in enforcing its valid taxes was sufficient to justify seizures of shipments of unstamped

cigarettes as contraband while they were in transit, traveling to the reservations. *Id.* at 161. "By seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests." *Id.* at 162.

Unlike the State of Washington in *Colville,* Congress provided Rhode Island with civil and criminal jurisdiction on the Narragansetts' settlement lands. 25 U.S.C. § 1708(a). In light of this authority and the precedent set in *Colville,* we find that the State of Rhode Island may have the power to enter onto the settlement lands and seize unstamped cigarettes as contraband, from the Indian distributor, provided that the action does not violate the Tribe's sovereign immunity.

3. The "Land"/"Tribe" Distinction

The Tribe contends that a distinction should be made between the jurisdiction the State was given over the settlement lands and any power the State might have over the Tribe itself. The Tribe argues that the grant of jurisdiction that Congress gave to the State of Rhode Island merely subjected "the settlement lands . . . to the civil and criminal laws and jurisdiction of the State," 25 U.S.C. § 1708(a), not the Narragansett Tribal government. The Tribe asserts that Congress intentionally limited this jurisdiction to the settlement lands, and that it knew how to write the Act to cover the Tribe as well if it had so intended. *See, e.g.,* Maine Settlement Act, 25 U.S.C. § 1725 (expressly providing the State with jurisdiction over "all Indians, Indian nations, or tribes or bands of Indians in the State of Maine . . . and any lands or other natural resources owned by any such Indian, Indian Nation, tribe or band of Indians, and any lands held in trust by the United States for any such Indian").

In ascertaining the intent of Congress in statutes regulating Indian tribes, we must read the statutes against a

backdrop of Indian sovereignty. *Colville,* 447 U.S. at 178 (citing *McClanahan,* 411 U.S. at 172). "[T]he [Supreme] Court has held that retained sovereignty includes the power of Indians to make and enforce their own substantive law in internal matters, including matters such as membership rules, inheritance rules, and the regulation of domestic relations." *Narragansett Indian Tribe,* 19 F.3d at 701 (citing *Santa Clara Pueblo,* 436 U.S. at 56).

Congress did not expressly give the State jurisdiction over the Narragansett Tribe in Section 1708. While we have said that the grant of jurisdictional power to the State is broad, we have also found that "the Tribe retains concurrent jurisdiction over the settlement lands," *Narragansett Indian Tribe,* 19 F.3d at 701, and that "any effort by the state to exercise [its] authority is hedged in by . . . the Tribe's retained rights of sovereignty . . ." *Id.* at 705. Therefore, as the district court stated, "when the Tribe acts '*qua* Tribe,' that is, as the political entity responsible for governing the Narragansetts, it is not subject to the State's civil and criminal laws and jurisdiction."

The Tribe asserts that the opening and operation of the Smoke Shop was a tribal government activity. The Narragansetts' Smoke Shop was opened pursuant to a resolution passed by the Narragansett Tribal Council with the stated purpose of providing economic development for the Tribal Nation. The Tribe, therefore, asserts that sovereign immunity precludes the State of Rhode Island from entering the settlement lands, serving a warrant on the tribal activity, and confiscating tribal government property as contraband.

While retained tribal sovereignty has never been precisely defined, the Supreme Court has offered the following description:

> Indian tribes are "distinct, independent political communities, retaining their original natural rights" in

> matters of local self-government. *Worcester v. Georgia*, 6 Pet. 515, 559 (1832) . . . Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-82 (1886). *See United States v. Wheeler*, 435 U.S. 313 (1978). They have power to make their own substantive law in internal matters, see *Roff v. Burney*, 168 U.S. 218 (1897) (membership); *Jones v. Meehan*, 175 U.S. 1, 29 (1899) (inheritance rules); *United States v. Quiver*, 241 U.S. 602 (1916) (domestic relations), and to enforce that law in their own forums, see, e.g., *Williams v. Lee*, 358 U.S. 217 (1959).

Santa Clara Pueblo, 436 U.S. at 55-56.

Precedent dictates that the determination of whether the Tribe's retained rights of sovereignty or the State's residual authority takes precedence should involve an interest balancing test that "[t]est[s] the sturdiness" of the barriers each presents and makes a "particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Narragansett Indian Tribe*, 19 F.3d at 705 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980)).[5] In this case, we must balance the State's interest in enforcing its cigarette laws with the Tribe's sovereignty

[5] We recognize that the Supreme Court has recently granted certiorari for a question regarding whether the Court should abandon the *White Mountain Apache* interest-balancing test in favor of a preemption analysis based on the principle that Indian immunities are dependent upon congressional intent. *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979 (10th Cir. 2004), *cert. granted*, U.S.L.W. 3513 (U.S. Feb. 28, 2005) (No. 04-631).

interests and related interests in tribal economic development and self-governance. As we stated previously, the precedent set in *Moe* and other cigarette tax cases involving Indian tribes is that Indian retailers on an Indian reservation may be required to collect the state cigarette taxes applicable to sales to non-Indians because the minimal burden imposed by this requirement is justified by the State's interest in assuring the payment of these lawful taxes.

The district court applied the test this Court used in *Akins v. Penobscot Nation,* 130 F.3d 482 (1st Cir. 1997), to determine whether the Tribe's operation of the Smoke Shop should be included in the Tribe's retained right of sovereignty. In so doing, the district court tightly confined the meaning of sovereign immunity to apply only when the Tribe acts in "matters of local governance." *Narragansett Indian Tribe,* 296 F. Supp. 2d at 175-77. We find it inappropriate to apply the *Akins* test in this instance.

In *Akins,* we established a multi-factor test for determining whether a policy or activity is, or is not, an "internal tribal matter," as that term was used in the Maine state legislation implementing the federal Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1725-1735 ("Maine Settlement Act"). The Maine Implementing Act makes the Penobscot Nation subject "to all the duties, obligations, liabilities and limitations of a municipality . . . provided, however, that *internal tribal matters* . . . shall not be subject to regulation by the State." Me. Rev. Stat. Ann. tit. 30, § 6206(1) (emphasis added).

While Rhode Island and Maine are similar to the extent that each state has reached a settlement with its Indian tribes which has been enacted by Congress, the provisions of the Maine Settlement Act and Implementing Act are very different from the Rhode Island Settlement Act, which did not limit the jurisdiction of the Narragansett Tribe, but rather

provided the State with concurrent jurisdiction. In *Akins*, we repeatedly warned that our analysis was unique to Maine because of the Maine Settlement Act and the State's Implementing Act. 130 F.3d 482, 484 ("The structure of analysis differs here from that which would be used in claims against the vast majority of other Indian tribes in the country."). We will not require the Narragansett Tribe to meet the "internal tribal matter" exception provided in the Maine Implementing Act when Congress did not place a similar limitation on the Narragansetts.

This is not to say that many of the *Akins* factors are not generally applicable. Nor do we disagree with the district court's conclusion that the Tribe's retained right of sovereignty will not shield the Tribe's unlawful operation of a Smoke Shop that offers non-Indian consumers a means to bypass the State's cigarette tax which would not otherwise be available to them off of the settlement lands.

4. The State's enforcement of its laws against the Narragansett Tribe

The next question concerns the extent to which the State may enforce its cigarette laws directly against the Narragansett Tribal government. We find that it is worthwhile to consider the fact that the Narragansett Tribe's sovereign immunity has not been abrogated and that there exist means by which the State could have enforced its cigarette tax laws which would have been more respectful of the Tribe's sovereignty.

The doctrine of tribal immunity is settled law today. The Supreme Court has refused to abandon or narrow this doctrine despite arguments that tribal businesses have become far removed from tribal self-governance and internal affairs. *See Kiowa*, 523 U.S. at 757. The Court stated that it "retained the doctrine . . . on the theory that Congress had

failed to abrogate it in order to promote economic development and tribal self-sufficiency." *Id.*

For example, in *Potawatomi,* the Supreme Court "reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid taxes." *Kiowa,* 523 U.S. at 755 (citing *Potawatomi,* 498 U.S. at 510). "There is a difference between the right to demand compliance with state laws and the means available to enforce them." *Id.* (citing *Potawatomi,* 498 U.S. at 514 ("There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives.")). Some of the alternatives referenced in *Potawatomi* include holding individual agents or officers of the tribe liable for damages in actions brought by the State, *see Ex parte Young,* 209 U.S. 123 (1908), collecting the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, *Colville,* 447 U.S. at 161-62, or assessing wholesalers who supplied unstamped cigarettes to the tribal stores, *City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n,* 898 F.2d 122 (10th Cir. 1990). Another option is that the State might enter into an agreement with the Tribe to adopt a mutually satisfactory regime for the collection of its cigarette tax.

Today we have held that the State's cigarette tax laws are applicable to sales to non-Indian customers on the settlement lands. The State of Rhode Island has numerous alternatives that it may use to enforce its cigarette tax on the settlement lands without violating the Tribe's sovereign immunity. The State's hands will not be completely tied while the Tribe continues to operate its Smoke Shop in violation of the State's cigarette laws. Although the operation of the Smoke Shop without complying with Rhode Island's cigarette tax laws is certainly not a sovereign right retained by the

Narragansett Tribe, the Tribe does have a right of sovereign immunity that should be respected the State. For these reasons, we hold that the State violated the Tribe's sovereign rights when it enforced the criminal provisions of its cigarette tax laws by executing a search warrant against the Tribal government's Smoke Shop, forcibly entering the Shop and seizing the Tribe's stock of unstamped cigarettes, and arresting tribal officials who were acting in their official capacity.

III. Conclusion

For the foregoing reasons, the district court's grant of summary judgment for the State is affirmed in part and, to the extent that the district court's declaratory judgment regarding the State's enforcement of its criminal statutes against the Tribal government is inconsistent with our holdings, reversed in part.

Affirmed in part, Reversed in part.

Appendix D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

NARRAGANSETT INDIAN TRIBE,
Plaintiff,

v.

THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS; GOVERNOR DONALD L. CARCIERI, State of Rhode Island, in his official capacity; PATRICK C. LYNCH, Rhode Island Attorney General, in his official capacity; RHODE ISLAND STATE POLICE; COLONEL STEVEN M. PARE, in his official capacity; JUSTICES OF THE RHODE ISLAND DISTRICT AND SUPERIOR COURTS; TOWN OF CHARLESTOWN; and CHARLESTOWN POLICE DEPARTMENT,
Defendants.

STATE OF RHODE ISLAND, by and through the ATTORNEY GENERAL,
Patrick C. Lynch,
Plaintiffs

v.

NARRAGANSETT INDIAN TRIBE OF RHODE ISLAND also known as the NARRAGANSETT TRIBE OF INDIANS and Does 1 through 100,
Defendants.

C.A. No. 03-296S

DECISION AND ORDER

WILLIAM E. SMITH, United States District Judge.

The oftentimes tumultuous relationship between the State of Rhode Island ("State") and the Narragansett Indian Tribe of Rhode Island ("Tribe" or "Narragansetts") brings the parties once again to court; the matter in dispute is whether the Tribe may operate a "smoke shop" on its settlement lands unfettered by the State's cigarette tax laws.

Before the Court are the parties' cross-motions for summary judgment in their respective actions for declaratory judgment. The Court concludes that the State properly may impose its tax on cigarettes sold at the tribal smoke shop located on the settlement lands, and may enforce the law's criminal provisions against non-compliance that occurs on the settlement lands. This conclusion is driven by the finding that the legal incidence of the State's cigarette tax scheme falls on the purchaser or consumer of cigarettes, and not on the Tribe. Under the State's cigarette tax scheme, the Tribe (like other retail sellers of cigarettes) acts merely as an agent for the collection of the tax. It is appropriate for the State to impose this burden on the Tribe; and such a burden does not amount to taxation of the Tribe, nor does it violate the Tribe's sovereign rights. Consequently, the Tribe must comply with Rhode Island's applicable tax laws if it wishes to continue to sell cigarette products on the settlement lands. Further, for the reasons discussed in greater detail below, because the legal incidence of the tax scheme falls on the consumer, this Court must decline to reach the question of whether the State may impose the cigarette tax scheme (or any other direct tax) directly on the Tribe. And finally, this Court finds that the State did not violate federal law nor the Tribe's sovereign rights when it enforced the criminal provisions of the State's cigarette tax scheme by executing a search warrant on the settlement lands.

I. Background

A. The Posture of the Case

The Tribe is a federally recognized Indian tribe,[1] *see* Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177-05 (Feb. 10, 1983), residing on Settlement Lands[2] located within the Town of Charlestown, Rhode Island. On July 12, 2003, the Tribe opened a smoke shop (the "Smoke Shop" or "Shop") on the Settlement Lands for the purpose of producing income for the Tribe. *See* Joint Stipulations ("Stips.")[3] ¶¶ 5, 7.

In general, retailers and distributors of cigarettes must comply with a number of statutory requirements relating to

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[1] Federal recognition confers certain status and privileges on a tribe:

> Upon final determination that the petitioner exists as an Indian tribe, it shall be considered eligible for the services and benefits from the Federal government that are available to other federally recognized tribes. The newly acknowledged tribe shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federally recognized historic tribes by virtue of their government-to-government relationship with the United States. It shall also have the responsibilities and obligations of such tribes. Newly acknowledged Indian tribes shall likewise be subject to the same authority of Congress and the United States as are other federally acknowledged tribes.

25 C.F.R. § 83.12(a).

[2] As set forth in detail at pp. [94a-95a], *infra*, the term "Settlement Lands" refers to approximately 1,800 acres of land acquired by the Tribe in exchange for the Tribe's settlement of claims that were pending in the United States District Court for the District of Rhode Island in the late 1970s. *See* 25 U.S.C. § 1702(f). They do not include other land acquired by the Tribe. (For simplicity, the Settlement Lands are sometimes referred to herein as "tribal lands.")

[3] In order to expedite consideration of the case by this Court, the parties have agreed to and filed joint stipulations of fact. *See* p. [90a], *infra*.

traffic in cigarettes, including provisions governing taxation. *See* R.I. Gen. Laws § 44-20-1, *et seq.*; p. [98a], *infra.* Furthermore, Rhode Island law requires cigarette retailers to obtain several permits and licenses, including a retail sales tax permit pursuant to R.I. Gen. Laws § 44-19-1 and a Sunday sales permit from the pertinent municipality in accordance with R.I. Gen. Laws § 5-23-2. Presumably to increase the profitability of the Shop and distinguish itself from other retailers of cigarettes, and believing that the State did not possess the legal authority to enforce its cigarette tax and licensing requirements on it, the Tribe chose not to comply with these laws. *See* Stips. ¶ 8.

For an unspecified period of time prior to the opening of the Shop, the Tribe imported unstamped cigarettes onto its lands from other states in anticipation of the Shop's grand opening. *See* Stips. ¶ 4. When the Shop opened, the Tribe offered unstamped and untaxed cigarettes to the general, retail public at prices substantially lower than the minimum established by State law. *See* Stips. ¶ 7. The Tribe also did not collect Rhode Island's 7% retail sales tax from customers purchasing cigarettes at the Smoke Shop. *See id.* Although some of the cigarettes were being sold to tribal members, a large proportion of the Shop's customers were not members of the Tribe. *See id.*

Believing that the operation of the Smoke Shop violated this myriad of laws (and specifically R.I. Gen. Laws §§ 44-20-35, 36, 37 and 38, which make it a misdemeanor criminal offense to sell unstamped cigarettes, and allow the seizure of such cigarettes as contraband), on July 14, 2003, the Rhode Island State Police executed a search warrant at the Shop and confiscated the Tribe's inventory of unstamped cigarettes. *See* Stips. ¶ 9. During the execution of the search warrant, an altercation occurred between some members of the Tribe and several State police officers. *See* Stips. ¶ 10. Eight tribal

members, including the Chief Sachem of the Tribe, were arrested following the melée. *See id.*

In the wake of the police raid, both the State and the Tribe brought the dispute to court. On July 15, 2003, the Tribe brought the first action in this Court, seeking a declaratory judgment against the State, the Governor and Attorney General of Rhode Island in their official capacities, the Rhode Island State Police, Colonel Steven Pare of the Rhode Island State Police in his official capacity, the Justices of the Superior and District Courts of the State of Rhode Island (in their official capacities),[4] the Town of Charlestown, and the Charlestown Police Department. (For simplicity's sake, these Defendants are collectively referred to herein as "Defendants" or "the State".) The Tribe's Complaint sets forth allegations that the Tribe's status under the Rhode Island Indian Claims Settlement Act ("Settlement Act"), 25 U.S.C. § 1701, *et seq.*, and its sovereign immunity as a federally recognized Indian tribe preclude the State and its officials from enforcing the State's cigarette sales and excise tax scheme with respect to tribal activities occurring on the Settlement Lands. The Tribe also filed a Motion for a Temporary Restraining Order in an effort to reopen the Smoke Shop pending the resolution of the case.

On July 17, 2003, the State brought a separate declaratory judgment action in Rhode Island State Superior Court seeking a declaration that the Tribe's failure to comply with State excise, retail, and sales taxes is unlawful. The State also moved for a temporary restraining order to prevent the Tribe from selling cigarettes on its Settlement Lands without

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[4] It is questionable whether the Justices of the Superior and District Courts of Rhode Island are properly named Defendants. However, neither party has addressed this issue, and in light of the Court's holding, there seems to be little reason to do so at this stage of the proceedings.

complying with Rhode Island's sales and excise tax laws. Later that same day, the Tribe removed the state court action to this Court, purportedly pursuant to 28 U.S.C. § 1441(b). The State did not object to this procedural maneuver. After conferring with counsel in chambers on the parties' respective Motions for Temporary Restraining Orders, the parties represented to the Court that the essential facts were not in dispute. They agreed, therefore, to file stipulated facts and cross-motions for summary judgment on an expedited schedule. Further, the parties agreed that the Smoke Shop would remain closed pending the resolution of the issues in the case, thereby mooting the requests for Temporary Restraining Orders.

On July 18, 2003, the Court consolidated the actions pursuant to Federal Rule of Civil Procedure 42(a). Thereafter, the Court consolidated the parties' Motions for Preliminary Injunctive Relief with the trial of the action on the merits, and, with the agreement of the parties, the Court established an expedited schedule. On July 30, 2003, the parties submitted factual stipulations and on August 20, 2003, they filed their cross-motions for summary judgment. The Court heard oral argument on September 23, 2003.

B. Jurisdiction

Although these cases have been consolidated pursuant to Fed. R. Civ. P. 42(a), the actions remain separate and this writer must first determine whether this Court has subject matter jurisdiction over each case independent of the other. The Court's subject matter jurisdiction in one case does not automatically confer it in the other.

Subject matter jurisdiction clearly exists in the action originally filed by the Tribe in this Court. *See* 28 U.S.C. § 1362 (which provides that "United States District Courts shall have original jurisdiction over all civil actions, *brought* by an Indian tribe . . . wherein the matter in controversy

arises under the Constitution, laws, or treaties of the United States.") (emphasis added).

Jurisdiction over the State's suit, which was removed to this Court, is another matter. This Court may exercise subject matter jurisdiction as to that action only if the State could have brought it in this Court originally. 28 U.S.C. § 1441(b). Under the "well pleaded complaint" rule, the federal question upon which subject matter jurisdiction is premised must be ascertainable on the face of the plaintiff's complaint. *See Rivet v. Regions Bank of Louisiana,* 522 U.S. 470, 475 (1998); *Delta Dental of Rhode Island v. Blue Cross & Blue Shield of Rhode Island,* 942 F. Supp. 740, 747 (D.R.I. 1996). The federal question must be presented by the plaintiff in the complaint, and cannot arise merely as a defense to the plaintiff's allegations. *See* Rivet, 522 U.S. at 475 ("A defense is not part of a plaintiff's properly pleaded statement of his or her claim."); *Delta Dental,* 942 F. Supp. at 747 ("An action arising under state law cannot be removed solely because a federal right or immunity can be raised as a defense.").

The State brought its action under Rhode Island's Uniform Declaratory Judgments Act, R.I. Gen. Laws § 9-30-1, *et seq.,* seeking a declaration that the Tribe's failure to comply with Rhode Island's cigarette sales and excise tax scheme was unlawful. The State's Complaint did not mention the Settlement Act, nor did it assert any other claim grounded in federal law. In its removal papers filed with this Court, the Tribe cited the Settlement Act, 28 U.S.C. § 1362, and two federal cases as grounds for this Court's jurisdiction over the removed action, and the State did nothing to oppose the removal.

The parties' cooperative effort to consolidate their cases in one court is admirable, but mutual desire and convenience is plainly insufficient to confer subject matter jurisdiction.

First, the Settlement Act cannot be a basis for subject matter jurisdiction over the State's action because the State did not bring its claims under the Settlement Act. In referring this Court to the Settlement Act, the Tribe essentially argues that the Court can maintain jurisdiction over the State's Complaint because the Tribe would raise the Settlement Act as a defense to the State's declaratory judgment action. As discussed above, the invocation of a federal statute as a defense is simply not, by itself, a viable basis for jurisdiction. Second, 28 U.S.C. § 1362 only vests jurisdiction in a federal court over actions *brought* by an Indian tribe under the laws of the United States. Since the State could not have brought an action in federal court under section 1362, the Tribe cannot properly rely on it to remove the State's Complaint to this Court.

Third, the cases cited by the Tribe in support of removal are unavailing and inapposite. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) is frequently cited for the proposition that federal law preempts state law in ERISA cases, but it has nothing to do with the asserted grounds for the Tribe's removal here. *Penobscot Nation v. Georgia-Pacific Corp.*, 106 F. Supp. 2d 81 (D. Me. 2000) involved an application of the well pleaded complaint rule; there, however, jurisdiction over an Indian tribe's challenge to Maine's Freedom of Information Act was *refused.*

Therefore, because this Court has no basis for exercising subject matter jurisdiction over the State's Complaint, that action is dismissed and remanded to state court.[5]

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[5] As a practical matter, this ruling will likely have no effect on the Court's ability to address the issues necessary to resolve this case. The Court will treat the State's Motion for Summary Judgment in the State's case as a motion for summary judgment in the Tribe's action.

C. The History of the Narragansett Tribe and its Relationship with the State of Rhode Island

Some historical context regarding the parties' relationship is helpful in understanding and deciding the questions presented. A slightly more than thumbnail discussion of this relationship follows.

The Narragansetts and the Puritan colonists of what is now Rhode Island peacefully coexisted from the time of the colonists' arrival until the end of the 17th century when the Tribe was drawn into King Philip's War. *See Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n,* 158 F.3d 1335, 1336 (D.C. Cir. 1998) (citing William G. McLoughlin, *Rhode Island* 4-5, 9-10 (1978)).[6] As a result of the war, the Tribe was decimated and its remaining members settled on land in what is now Charlestown, Rhode Island. *See id.* In 1880, after nearly one hundred years of resistance, the Narragansetts agreed to sell all but two of their acres in Charlestown for the sum of $5,000. *See id.*

For nearly a century, all was quiet. Then, early in 1978, the Tribe filed two complaints in this Court that rocked the State (and particularly the residents of Charlestown), alleging its entitlement to the possession of approximately 3,200 acres of land in Charlestown. The Tribe claimed that it owned this land as part of its historical aboriginal territory, and that the State had improperly alienated the Tribe from the land in 1880 in violation of the Indian Nonintercourse Act, 25

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[6] King Philip's War was waged in 1675 between the British government and various Native American tribes. At the time of the war, Metacomet, Massasoit's son, was Chief of the Wampanoags and had been friendly with the British. The British referred to Metacomet as "Philip," after Philip of Macedon.

U.S.C. § 177.[7] The Tribe contended that the alienation of the lands violated the Nonintercourse Act because the transfer was never approved by the federal government. The Tribe argued that its aboriginal title to these lands was never extinguished and was therefore superior to any title held by any landowner who acquired land subsequent to the transfers in 1880.

The filing of these suits clouded the titles of hundreds of landowners in Charlestown. To clear up this murky state of affairs, and resolve the land dispute, the Narragansetts, Charlestown, and the State settled the lawsuits and memorialized their agreement in a Joint Memorandum of Understanding ("JMOU") on February 28, 1978. *See* 25 U.S.C. §§ 1701(c), 1702(h). The JMOU, among other things, provided for the following: (1) the State would enact legislation creating a state-chartered, Indian-controlled corporation with an irrevocable charter for the purpose of permanently holding and managing the Settlement Lands in trust for the Narragansetts; (2) the Settlement Lands would include approximately 900 acres of privately held land (to be purchased with a federal appropriation) and approximately

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[7] The Indian Nonintercourse Act was enacted not long after the founding of the nation, at a time when the relationship between the newly formed government of the United States and the various Native American tribes inhabiting the land was in its infancy. The act embodies the policy of the United States to acknowledge and guarantee the Indian tribes' right of occupancy of tribal lands and to prevent the tribes from disposing of their land improvidently. *Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp.*, 418 F. Supp. 798, 803 (D.R.I. 1976).

> The act provides, in pertinent part, that:
> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177.

900 acres of state owned land (to be transferred by the State); (3) the Settlement Lands would be subject to a special federal restraint against alienation and would be exempt from federal, state, and local taxation; the Town would instead receive "in lieu" payments for governmental services provided by the Town with respect to the land; (4) all laws of the State would continue in full force and effect on the Settlement Lands, but the Indian-controlled corporation would be given authority to establish its own hunting and fishing regulations on the Settlement Lands; and (5) the Narragansetts would agree to dismiss with prejudice their complaint against the State, and agree to the extinguishment of all Indian land claims in Rhode Island. JMOU (reprinted at H. Rep. No. 1453, 95th Cong., 2d Sess. 6 (1978), U.S. Code Cong. & Admin. News 1978, p. 1948); *Town of Charlestown v. United States,* 696 F. Supp. 800, 802-03 (D.R.I. 1988).

Because Congress has plenary power over Indian matters, the settlement agreement was meaningless unless it was passed into law by an act of Congress. *See Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685, 689 (1st Cir. 1994) ("*Narragansett Indian Tribe*") (citing *Morton v. Mancari,* 417 U.S. 535, 551-52 (1974)). At the behest of the State's congressional delegation, Congress enacted the Settlement Act, which in large measure tracks the substance and structure of the JMOU. *See id.*

The Settlement Act established a fund with an initial appropriation of $3,500,000 for the purchase of the privately owned lands that were to comprise half of the Settlement Lands. *See* 25 U.S.C. §§ 1703-1707, 1710. To facilitate the purchase and transfer of these land tracts, the Settlement Act called for the creation of a state-chartered corporation by the State of Rhode Island ("State Corporation"). *See* 25 U.S.C. §§ 1705-1707. Consistent with the JMOU, the Settlement

Act further provided that the land transferred to the State Corporation would not "be subject to any form of Federal, State, or local taxation. . . ." 25 U.S.C. § 1715(a).

The final link in the settlement chain was passed by the Rhode Island General Assembly on May 4, 1979. As required by the Settlement Act, the General Assembly enacted the Narragansett Indian Land Management Corporation Act (the "State Act"), Pub. L. No. 1979, ch. 116, 1979 R.I. Pub. Laws 402, which "authorized, created and established a permanent, public corporation of the state having a distinct legal existence from the state and not constituting a department of state government[.]" R.I. Gen. Laws § 37-18-3. Like the Settlement Act, the State Act exempted the Settlement Lands from taxation and assessment.[8]

Although the State Corporation was apparently intended to be permanent, in 1985, the Rhode Island General Assembly amended the State Act by providing an expiration date for the State Corporation and for the transfer of the Settlement Lands from the State Corporation to the Narragansetts. *See* R.I. Gen. Laws §§ 37-18-12, 37-18-13. These amendments were contingent upon the Narragansetts obtaining federal recognition as an Indian tribe pursuant to 25 U.S.C. § 1707 and 25 C.F.R. § 83. Once the Tribe

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[8] The State Act provided, in pertinent part, that:

> [t]he [State] corporation shall make payments in lieu of real property taxes and assessments to the town with respect to income producing projects of the corporation located in the town, and for police, fire, sanitation, health protection and municipal services provided by the town to the real estate held by the corporation in the town. The payments in lieu of taxes shall be in such amounts as shall be agreed upon by the corporation and the town.

R.I. Gen. Laws § 37-18-9(b).

attained this status, the State Corporation would cease to exist and the Settlement Lands would be transferred to the Narragansetts. *See* R.I. Gen. Laws § 37-18-13. On February 2, 1983, the federal government recognized the Narragansetts as an Indian tribe. See 48 Fed. Reg. 6177-78 (Feb. 2, 1983). Pursuant to the amendments to the State Act, the Settlement Lands were then transferred to the Narragansetts. While the State Act, like the Settlement Act, recognized that the Narragansetts were not required to pay any taxes or assessments on the Settlement Lands, the State Act also provided that the State Corporation was subject to all of the criminal and civil laws of the State. *See* R.I. Gen. Laws §§ 37-18-9, 37-18-11. In 1988, the Settlement Lands changed hands for the last time when the Narragansetts deeded the Settlement Lands to the Bureau of Indian Affairs ("BIA") to be held in trust for the Tribe. *See Narragansett Indian Tribe,* 19 F.3d at 689. The deed transferring the Settlement Lands to the BIA expressly recognized the applicability of state laws conferred by the Settlement Act.[9]. As things presently stand, the Settlement Lands remain in the hands of the BIA, in trust for the Tribe.

II. Summary Judgment Standard

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). The Court must "view all facts and draw inferences in the light most favorable to the nonmoving party." *Reich v.*

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[9] On September 4, 2003, after the commencement of this litigation, the Tribe filed a new deed with the BIA. The new deed eliminates this language. The State has initiated an action in this Court against the BIA to prevent the acceptance of the new deed. *See Carcieri, et al. v. Norton, et al.*, C.A. No. 03-469S (D.R.I. filed Oct. 8, 2003). No action has yet been taken in that case.

John Alden Life Ins. Co., 126 F.3d 1, 6 (1st Cir. 1997) (citing *Continental Cas. Co. v. Canadian Universal Ins. Co.*, 924 F.2d 370, 373 (1st Cir. 1991)). As discussed above, the relevant facts in this case, as presented in the parties' stipulations, are well known and not in dispute. The matter is therefore ripe for summary judgment.

III. Analysis

A. Rhode Island's Cigarette Tax Scheme

Every person engaged in the sale of cigarettes in Rhode Island must first obtain a license from the State Tax Administrator. R.I. Gen. Laws § 44-20-2. In addition to this licensing requirement, Rhode Island imposes an excise tax on cigarettes sold, distributed, held, or consumed within its borders. R.I. Gen. Laws § 44-20-12. The tax is collected through the sale of cigarette stamps, which must be affixed to all packages of cigarettes possessed within the State (with limited exceptions). R.I. Gen. Laws §§ 44-20-13, 44-20-18, 44-20-30. State law also requires a retailer to add a sales tax to the sale price of the cigarettes. R.I. Gen. Laws § 44-18-19.

The excise tax imposes obligations on distributors, dealers,[10] and consumers. Distributors must affix tax stamps in the proper denominations at the location where their license is issued. The stamps may be affixed to a distributor's cigarettes at any time before transferring the possession of the cigarettes. R.I. Gen. Laws § 44-20-28. When a dealer receives unstamped cigarettes, he or she must affix stamps within twenty-four hours after coming into possession of the cigarettes. R.I. Gen. Laws § 44-20-29. Furthermore, the State, with the assistance of the federal

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[10] A dealer "means any person other than a distributor who is engaged in [Rhode Island] in the business of selling cigarettes." R.I. Gen. Laws § 44-20-1(3).

government, has developed a method to collect the excise tax from consumers who reside in Rhode Island but purchase cigarettes from a dealer outside of the State.[11] Finally, State law makes it unlawful to sell or possess unstamped cigarettes, *see* R.I. Gen. Laws §§ 44-20-35, 44-20-36, and cigarettes not bearing stamps that are not exempt are contraband and subject to seizure by the State. R.I. Gen. Laws §§ 44-20-37, 44-20-38.[12]

B. Where Does the Legal Incidence of the Cigarette Tax Fall?

The legality of Rhode Island's imposition of the Cigarette Tax on the sale of cigarettes by the Tribe depends altogether on a determination of who bears the legal incidence of the Cigarette Tax. If, as the State contends, the incidence of the Cigarette Tax ultimately falls on consumers (*i.e.*, those who patronize the Smoke Shop as purchasers of cigarettes), that disposes of the case, as the State cannot be barred from enforcing the Cigarette Tax by virtue of the Tribe's sovereign status. However, if, as argued by the Tribe, the legal incidence of the Cigarette Tax rests on the Tribe or its members, as dealers of cigarettes, the Cigarette Tax cannot be enforced absent clear congressional authorization which, the Tribe claims, is absent. *See Oklahoma Tax Comm'n v.*

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[11] The Jenkins Act, 15 U.S.C. § 375, *et seq.*, was designed to assist states in collecting cigarette sales taxes on cigarettes sold through mail order or over the Internet. Under that act, persons who ship cigarettes into Rhode Island that do not bear the requisite tax stamp are required to provide Rhode Island's State Tax Administrator with a periodic report of their customers. Upon receipt of the report, the state will send tax bills to the customer informing him or her of their obligation to pay the requisite tax under Rhode Island law.

[12] For simplicity, the Court will refer to the complex of cigarette tax statutes described above as the "Cigarette Tax" or "Cigarette Tax Scheme."

Chickasaw Nation, 515 U.S. 450, 459 (1995) (citing *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 475-81 (1976)); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992).

To answer the question of where the legal incidence of the tax falls, the Court begins by examining the pertinent language of the statute in question. The Supreme Court has held that the applicable taxing statute must be given "a fair interpretation . . . as written and applied. . . ." *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985) (per curiam); *see* Chickasaw, 515 U.S. at 461. Rhode Island law is explicit: "[a]ll taxes paid in pursuance of [the Cigarette Tax] are conclusively presumed to be a direct tax on the retail consumer, precollected for the purpose of convenience and facility only." R.I. Gen. Laws § 44-20-53.[13] In other words, the retailer pays the Cigarette Tax to the wholesaler or distributor and then adds it to the price paid by the ultimate purchaser of the cigarettes.

The State contends that a literal reading of Rhode Island's Cigarette Tax Scheme makes plain that the legislature intended to place the legal incidence of the Cigarette Tax on the consumer. The State relies on a raft of United States Supreme Court decisions uniformly holding that the legal incidence of taxes of this stirp falls on the consumer. The Tribe rejoins that while Rhode Island law creates a "legal presumption" that the incidence of the tax falls on the consumer, "the operational legal incidence of the tax falls squarely on the Tribe." Pl. S.J. Mem. at 47.

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[13] Provisions of this type have been referred to as "pass through" provisions, in that the language of the statute requires distributors and retailers to pass on the tax to consumers via the price of the product. *See Chickasaw*, 515 U.S. at 461; *Moe*, 425 U.S. at 482.

The Tribe's argument misses the mark. As the State points out, the Supreme Court has upheld the imposition of various state tax laws pertaining to the sale of cigarettes on Indian land. *See, e.g., Dept. of Taxation and Fin. of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); Moe, 425 U.S. 463. These cases have soundly rejected the argument made by the Tribe that the pass through provision places the "operational" legal incidence on Tribe, and therefore amounts to a tax on the Tribe itself.

For example, in *Moe*, the Supreme Court considered a state taxing scheme very similar to Rhode Island's. The Confederated Salish & Kootenai Indian Tribes brought an action seeking declaratory and injunctive relief against Montana's cigarette licensing statute as applied to tribal members selling cigarettes on reservation land. Under Montana's cigarette licensing statute, a seller of cigarettes was required to precollect taxes on cigarettes sold at retail by adding the tax to the sale price of the cigarettes. The tribes argued that the procedure made "the Indian retailer an 'involuntary agent' for collection of taxes owed by non-Indians" and was therefore "a 'gross interference with [their] freedom from state regulation . . . .'" *Id.* at 482 (citing *Warren Trading Post v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965)). The tribes further contended that forcing them to collect the cigarette tax on sales by Indians to non-Indians amounted to a tax on the tribes. *See id.* at 481.

Looking to the language of the statute, which provided that the tax "shall be conclusively presumed to be [a] direct [tax] on the retail consumer precollected for the purpose of convenience and facility only," (quoting Mont. Rev. Code Ann. § 84-5606(1) (1947)), the Court agreed with the lower court's conclusion that "it is the non-Indian consumer or user

who saves the tax and reaps the benefit of the tax exemption." *Id.* at 482. The Court found that the purpose of the tax scheme was to reduce the chance that non-Indian purchasers would purchase unstamped cigarettes without later submitting the appropriate tax. The Court reasoned that Montana's

> requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax.

Id. at 483. Therefore, "to the extent that the 'smoke shops' sell to those upon whom the State has validly imposed a sales or excise tax . . . the State may require the Indian proprietor simply to add the tax to the sales price[.]" *Id.* at 483.

Since *Moe*, the Supreme Court has continued to affirm that cigarette tax schemes containing pass through provisions place the legal incidence of the tax on the consumer. *See Chickasaw*, 515 U.S. at 461 (pass through provisions are dispositive when determining who bears a tax's legal incidence); *Milhelm Attea*, 512 U.S. at 64 (upholding cigarette tax scheme that provides that "the ultimate incidence of and liability for the tax [is] upon the consumer"). Indeed, the Supreme Court has upheld numerous cigarette tax schemes even without pass through language that explicitly states that the consumer bears the legal incidence of the tax. *See* Chemehuevi, 474 U.S. at 11 (holding that an express pass through statement is not necessary before an Indian tribe may be required to collect cigarette taxes); *Colville*, 447 U.S. at 159 (holding that the legal incidence of a cigarette tax fell on the consumer, and not the Indian tribe, because the consumer's purchase of the cigarettes was the first taxable event in the chain of distribution).

The Tribe attempts to circumvent this formidable line of Supreme Court authority with a decision of the Rhode Island Supreme Court—*Daniels Tobacco Co., Inc. v. Norberg*, 335 A.2d 636 (R.I. 1975). *Daniels* involved an attempt by the Rhode Island State Tax Administrator to assess $21,733.16 in taxes on cigarettes and tobacco products that had been stolen prior to the assessment. At an administrative hearing, the taxpayer, a distributor, submitted evidence that seventy percent of the cigarettes upon which taxes were assessed were destined for out-of-state sale. The Administrator ruled against the taxpayer, and ordered full payment of the taxes due. The taxpayer appealed to the Superior Court, which reversed the decision of the Administrator and ordered a refund to the taxpayer in the amount of $15,321.88. The Superior Court held that the Rhode Island Cigarette Tax Scheme imposed a tax only on cigarettes sold in Rhode Island, or held for sale in Rhode Island. Accordingly, a tax could only be imposed on the quantity of cigarettes that was being held for sale in Rhode Island.

On appeal, the taxpayer contended that he was entitled to a refund of the tax assessed on cigarettes held for sale in Rhode Island because they had been stolen before they were shipped or delivered to customers in Rhode Island. *Id.* at 505. The taxpayer argued that, under Rhode Island law, distributors are not liable for the imposition of the Cigarette Tax because the tax is actually a direct tax on the consumer. The Rhode Island Supreme Court disagreed, holding that the legal incidence of the tax falls on the distributor, not the consumer:

> The taxpayer overlooks § 44-20-28, which requires a distributor to affix tax stamps to all cigarettes he distributes. [T]he mere fact that the ultimate economic burden of a tax is on the consumer does not determine the legal incidence of the tax.

Id. at 506 (citing *Ferrara v. Director, Div. of Taxation*, 317 A.2d 80 (1974)). The court concluded that the risk of loss of cigarettes lies with the distributor and not the state.

The Tribe contends that *Daniels* controls here, even in the face of the substantial Supreme Court authority to the contrary, because the Rhode Island Supreme Court is the final arbiter of Rhode Island law. The Tribe's argument is misguided for several reasons.

As an initial matter, this Court is not bound by the Rhode Island Supreme Court's reasoning in *Daniels*. Indeed, when the rights of sovereigns are implicated, this Court is *compelled* to look to federal law to determine where the legal incidence of a state tax falls. *See United States v. Mississippi Tax Comm'n*, 421 U.S. 599, 609 n.7 (1975); *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954) (where the legal incidence of a tax falls is a question of federal law, otherwise "a state court might interpret its tax statute so as to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign").[14] Moreover, because *Daniels* predates *Moe*, the Rhode Island Supreme Court rendered its decision without the benefit of the Supreme Court's finding that pass through tax provisions are dispositive as to who bears the legal incidence of a tax. As such, the holding of

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[14] In fact, one case cited by the Tribe for the proposition that *Daniels* controls actually states just the opposite. *See Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 578 (10th Cir. 2000) ("For our purposes, the question of where the legal incidence of the Kansas motor fuel tax rests is one of federal law."). For this reason, the Tribe's reliance on *Coeur D'Alene Tribe v. Hammond*, 224 F. Supp. 2d 1264, 1270 (D. Id. 2002) does not assist it. In *Hammond*, the court improperly relied on Idaho Supreme Court precedent to hold that the legal incidence of an Idaho fuel sales tax fell on Indian retailers, and not the consumer.

Daniels, even if read as the Tribe would have it, is suspect and, in any event, unpersuasive in light of *Moe.*[15]

In plain language, the pass through provision of Rhode Island's Cigarette Tax Scheme states that the legal incidence of the Cigarette Tax falls on the consumer. While the Supreme Court has held that a tax scheme does not need to contain such an express statement to place the legal incidence of a tax on the consumer, the Court has enforced such provisions when they are present. Rhode Island's Cigarette Tax Scheme is virtually identical to the pass through provision upheld by the Supreme Court in *Moe,* and under the holding of *Chickasaw* that is "dispositive". 515 U.S. at 461. Moreover, the Tribe's argument that, notwithstanding section 44-20-53, it bears the "operational legal incidence" of the cigarette tax, simply cannot withstand this tidal wave of authority. The Supreme Court has stated repeatedly that a state may impose minimal burdens on retailers of cigarettes (specifically, Indian tribes) by using pass through language in order to ensure that a tax is collected, without changing the locus of the legal incidence. The minimal administrative burden of precollection simply does not overcome the force of state law placing the legal incidence on the consumer. This Court finds that the requirements that the Cigarette Tax

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[15] Furthermore, even if this Court were bound by *Daniels* (which it undoubtedly is not), its holding is ambiguous with regard to the legal incidence of Rhode Island's Cigarette Tax. *Daniels* did not explicitly hold that the legal incidence of the Cigarette Tax Scheme fell on the distributor (although this may well have been the court's intention); rather, the explicit holding in *Daniels* is that the sole fact that the final economic burden of the Cigarette Tax rests on the consumer is not dispositive when determining who bears the legal incidence of the tax. This says nothing about whether the pass through provision of the Cigarette Tax places the legal incidence of the tax on the consumer, or whether it falls on someone else-indeed, *Daniels* never explicitly addressed the pass through provision.

Scheme places on the Tribe are no more burdensome than those previously upheld in *Moe, Colville, Milhelm Attea,* and their kindred cases.[16] Therefore, based upon the clear language of section 44-20-53, this Court holds that the legal incidence of Rhode Island's Cigarette Tax falls on the consumer.[17]

C. The Unanswered Questions

The Court's determination that the legal incidence of the Cigarette Tax falls on the consumer, and not the Tribe, renders it unnecessary and inappropriate to decide two essentially identical questions contained in the Complaint and argued extensively by the parties; both questions involve the issue of whether, assuming that the legal incidence of the Cigarette Tax falls upon the Tribe, such a tax is lawful in light of the Tribe's sovereign status, and the requirement of unmistakably clear congressional authorization for a direct tax on the Tribe.[18] In the context of declaratory judgment actions, the First Circuit has urged district judges to exercise caution in deciding difficult constitutional questions. In *El Dia, Inc. v. Hernandez Colon,* 963 F.2d 488 (1st Cir. 1992) the court admonished:

> Especially when matters of great public moment are involved, declaratory judgments should not be pronounced 'unless the need is clear, not remote or speculative.' . . . [C]ourts should withhold

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[16] *See, e.g., Chickasaw,* 515 U.S. 450; *Chemehuevi,* 474 U.S. 9.

[17] The Complaint does not request a declaration about whether the State may impose its Cigarette Tax on either *Indian* or *tribal* consumers who purchase Smoke Shop products, and this Court makes no finding on that issue in this decision.

[18] *See, e.g.,* Pl. S.J. Mem. at 15-44; Def. S.J. Mem. at 5-22; Pl. Reply Mem. at 6-39; Def. Mem. Opp. S.J. at 3-25.

> declaratory relief as a matter of discretion if such redress is unlikely to palliate, or not needed to palliate, the fancied injury, especially when refraining from issuing a declaratory judgment 'avoid[s] the premature adjudication of constitutional issues.' . . . [W]e believe that declaratory judgments concerning the constitutionality of government conduct will almost always be inappropriate when the constitutional issues are freighted with uncertainty and the underlying grievance can be remedied for the time being without gratuitous exploration of uncharted constitutional terrain.

Id. at 494 (citations omitted). Thus, although the Tribe seeks declarations both that "the [Tribe], within its inherent sovereign power and as a matter of federal law, has authority to sell cigarette products free from state laws upon Tribal lands," and that "the Settlement Act does not subject the Tribe to State taxation for the sale of cigarette products," Complaint at 8, ¶¶ a, b, this Court will not oblige. In order to analyze these questions, the Court would have to assume hypothetically that the legal incidence of the Cigarette Tax fell on the Tribe; all subsequent conclusions with respect to the Tribe's retained rights of sovereignty and the State's jurisdiction over the Settlement Lands would proceed on the basis of this conjecture. To issue gratuitous declarations on complex and untested constitutional questions, especially in the area of the authority of the State (via the Settlement Act) to impose a direct tax on the Tribe,[19] would almost certainly offend the call for judicial discretion announced in *El Dia.*

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[19] The Court is especially mindful of the early statement of the Supreme Court that "the power to tax involves the power to destroy," *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 431 (1819), and the "categorical approach" with respect to a state's power to tax reservation lands and

(. . . cont'd)

If this leaves the waters in a turbid state, that cannot be avoided. The nature of the State's jurisdictional power over the Settlement Lands and the contours of the Tribe's retained rights of sovereignty have long been and "remain[ ] ill-defined in certain respects." *Narragansett Indian Tribe,* 19 F.3d at 705. These and other questions will be tested in their own time.

D. May the State Enter Onto the Settlement Lands to Enforce the Cigarette Tax Scheme Without Violating the Tribe's Retained Rights of Sovereignty?

The Tribe also seeks declarations that the July 12, 2003 search warrant, and the arrests made in connection with its execution, be "vacated or otherwise held in violation of federal law and the Tribe's sovereign rights thereunder." Complaint at 8, ¶¶ c, d. This Court has held that the legal incidence of the Cigarette Tax Scheme falls on the consumers of Smoke Shop products, not on the Tribe. Therefore, the Tribe is obligated under the Cigarette Tax Scheme to purchase tax stamps for the cigarettes that it intends to sell at its Smoke Shop, or to purchase cigarettes for resale which already have stamps affixed. The refusal or failure of the Tribe to do so is a criminal offense, albeit a minor one. The question, then, is whether and to what extent may State law enforcement officers invade tribal lands to enforce this type of violation of State law. Asked another way, does the sovereign status of the Tribe and its land stand as a barrier to the enforcement of the criminal provisions of the Cigarette Tax Scheme.

(Cont'd . . .)
Indians subsequently adopted by the Court. *Yakima,* 502 U.S. at 258; *see* n.22, *infra.*

The analysis of this question begins where the First Circuit left off in its informative discussion of the history and application of the Settlement Act in *Narragansett Indian Tribe.* The dispositive finding in that case was that Congress, in passing the Indian Gaming Regulatory Act ("Gaming Act"), had impliedly repealed the Settlement Act with respect to gambling activities. 19 F.3d at 704-05.

Regarding section 1708 of the Settlement Act,[20] Judge Selya, writing for the court, considered whether its scope encompassed the State's civil regulatory jurisdiction. In concluding that it did, the court examined the evolution of the language, as expressed in the JMOU, the original Senate bill, and the final enacted version:

> [t]he progressive development of the jurisdictional language can more plausibly be interpreted as intended to clarify the breadth of the grant, rather than to narrow it. . . . "Civil and criminal laws and jurisdiction" more obviously includes all sorts of jurisdiction, and can fairly lay claim to being the broadest of the three formulations.

Id. at 695.

The court, of course, carefully circumscribed its holding to the particular issue before it, acknowledging that it could not answer "all the relevant questions" pertaining to the contours of the concurrent sovereignty of State and Tribe. Nevertheless, in explaining its conclusions with respect to the interplay between the Settlement and Gaming Acts, the court

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[20] 25 U.S.C. § 1708(a) provides:

> In general
> Except as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.

"offer[ed] a few words of guidance" regarding the shared jurisdiction of the State and the Tribe:

> [t]his means that the state continues to possess a quantum of regulatory authority. Of course, any effort by the state to exercise this residual authority is hedged in by barriers on both sides: on one side, by the Tribe's retained rights of sovereignty; on the other side, by the Tribe's congressionally approved authority over a specific subject matter, namely, gaming. Testing the sturdiness of one or the other of these barriers in a given case will require "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). We cannot undertake such an inquiry in the abstract, and, thus, the jurisdictional status of the settlement lands remains ill-defined in certain respects. But that is the nature of litigation[.]

Id. at 705.[21]

The present case, therefore, is a challenge to the State's attempt to exercise its residual "quantum of regulatory

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[21] One of the two "barriers" adverted to by the court as a potential impediment to the exercise of the State's regulatory authority was removed shortly after the court issued its decision. "Congress, responding to Judge Coffin's suggestion [in his dissent in *Narragansett Indian Tribe*], amended the Settlement Act to make clear that [the Gaming Act] had not preempted its grant of state jurisdiction." *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1338 (D.C. Cir. 1998). The so-called "Chafee Amendment" to the Settlement Act, codified at 25 U.S.C. § 1708(b), survived an Equal Protection-based challenge in *Nat'l Gaming Comm'n. Id.* at 1342 ("The Chafee Amendment . . . represents a rational exercise of congressional authority to enforce the terms of the original agreement by which the Narragansetts regained tribal lands.").

authority" over the Settlement Lands in the context of the criminal enforcement of its Cigarette Tax Scheme. Neither this Court nor the court of appeals has confronted precisely the question of the extent to which the State may encroach upon the Tribe's Settlement Lands to enforce its criminal laws. Likewise, the Supreme Court has not issued definitive guidance on this questions. *See generally California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 214-15 (1987) ("Our cases, however, have not established an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent.").[22] However, where there is congressional authorization regarding state criminal jurisdiction, as there is here, there is little doubt about the matter. Section 1708 of the Settlement Act makes clear that the tribal lands are subject to the "criminal laws and jurisdiction" of the State. If that phrase is to have any meaning, it must include the right of State law enforcement officials to enter tribal property

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[22] In footnote 17 of *Cabazon Band,* the Supreme Court discusses at length the special area of state taxation of Indian tribes, and the need for explicit congressional authorization. This is a topic to which, as noted above, the parties and the amici have devoted considerable effort, but which this Court must decline to address. The issue of enforcement of the criminal provisions of the Cigarette Tax Scheme, while related to, is not the same as the imposition of the tax itself. It is worth repeating that the alleged criminal violation is the holding for sale of unstamped cigarettes, not the failure to pay taxes on sales of those cigarettes. This may be a fine distinction, but it is a relevant one nevertheless. Therefore, in this writer's view, the special treatment which the Supreme Court has reserved for direct taxation of tribes by states does not apply to the criminal enforcement provisions of such laws, particularly where, as here, the Court holds that the Cigarette Tax is not a direct tax upon the Tribe.

pursuant to a validly issued search warrant to seize contraband.[23]

Support for this conclusion is found in the fairly recent case of *Nevada v. Hicks*, 533 U.S. 353 (2001). There, Justice Scalia offered the following guidance on the circumstances in which a State may enforce its laws on tribal lands:

> "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, as exemplified in our decision in [*Colville*]. . . . It is also well established in our precedent that States have criminal jurisdiction over reservation Indians for crimes committed . . . off the reservation. While it is not entirely clear from our precedent whether the last mentioned authority entails the corollary right to enter a reservation (including Indian-fee lands) for enforcement purposes, several of our opinions point in that direction. In [*Colville*], we explicitly reserved the question whether state officials

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[23] This Court notes that there are criminal proceedings presently pending in Rhode Island District Court related to the events of July 14, 2003, and a recently filed civil action in this Court alleging that law enforcement officers violated tribal members' civil rights during the raid and the ensuing arrests. The Court takes no position on the legality of the process used to obtain the search warrant nor on the arrests of tribal officials and members in connection with its execution. Nor will it address the Tribe's procedural Due Process and Supremacy Clause arguments as to the search warrant, since the Complaint contains no allegations with respect to these constitutional theories.

> could seize cigarettes held for sale to nonmembers in order to recover the taxes due.

Id. at 362-63 (citations omitted). The criminal enforcement provisions controlling the seizure of contraband cigarettes (*see* R.I. Gen. Laws §§ 44-20-35 through 44-20-38) are of the very kind not addressed in *Colville.* While the *Colville* Court expressly reserved judgment on the question of whether state officials could seize cigarettes held for sale on tribal land in violation of a state cigarette tax scheme,[24] this writer believes that when the holdings of *Colville* and *Hicks* are read in conjunction with the conferral of criminal and civil (which includes regulatory) jurisdiction contained in section 1708, it is beyond doubt that criminal law enforcement, including the seizure of contraband, on the Settlement Lands is permissible.

The Tribe raises two fundamental defenses to State enforcement of its Cigarette Tax Scheme on the Smoke Shop, neither of which is ultimately persuasive, but which do merit discussion.

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[24] The specific language of *Colville* on this question is as follows:

> The State in fact seized shipments traveling to the reservations from out-of-state wholesalers before being enjoined from doing so by the District Court. . . . We find that Washington's interest in enforcing its valid taxes is sufficient to justify these seizures. . . . It is significant that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries. . . . Washington further contends that it may enter onto the reservations, seize stocks of cigarettes which are intended for sale to nonmembers, and sell these stocks in order to obtain payment of the taxes due. However, this question, which obviously is considerably different from the preceding one, is not properly before us. . . . We therefore express no opinion on the matter.

447 U.S. at 161-62 (citations omitted).

1. Indian Country

Plaintiff's first line of defense against section 1708 involves the venerable concept of "Indian country," defined by statute as

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151(a).[25] "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Alaska v. Native Village of Venetie Tribal Gov't,* 522 U.S. 520, 527 n.1 (1998).

The Tribe and its amicus supporters contend that the Settlement Lands are Indian country under subsection (a) of section 1151, and that "[w]hile Rhode Island, as a result of the Settlement Act, may have more authority in Indian country than some other states, it is patently erroneous to assert that Congress has relinquished superintendence over the [Settlement Lands]." ACLU Amicus Curiae Reply Mem.

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[25] "[T]he Supreme Court has repeatedly stated that the definition provided in section 1151 'applies to questions of both criminal and civil jurisdiction.'" *Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co.,* 89 F.3d 908, 915 (1st Cir. 1996) (citing *Cabazon Band,* 480 U.S. at 208).

at 7; *see* Pl. Reply Mem. at 15 ("Nothing in the . . . Settlement Act repeals, abrogates, or 'eclipses' the applicability of federal law on the Settlement Lands.").

The State counters that the Settlement Act specifically subjects the Settlement Lands to the jurisdiction of the State, simultaneously divesting (by implication) the federal government of all power over their superintendence. The State points not only to section 1708, but also to 25 U.S.C. § 1707(c), which states that the federal government "shall have no further duties or liabilities under this subchapter with respect to the Indian Corporation or its successor, the State Corporation, or the settlement lands [,]" once it has fulfilled its obligations under sections 1704, 1705, 1706, and 1707.[26] "It is hard to imagine," argues the State, "an action that more clearly demonstrates an intent to relinquish federal superintendence than such a conveyance." Def. S.J. Mem. at 7.

Hard to imagine or not, it is ultimately not necessary to decide the point, and the Court declines to do so. Although it is true that "[f]ederal recognition and federal land trusteeship ordinarily have the effect of making tribal land 'Indian country' subject to federal law, not state law," *Nat'l Indian Gaming Comm'n,* 158 F.3d at 1341, such is obviously not the case here. Federal courts have found time and again that the State continues to possess a "quantum" of jurisdictional power over the Settlement Lands, notwithstanding the impact of federal recognition. *Id.* at 1342 (citing *Narragansett Indian Tribe,* 19 F.3d at 695 ("at every salient moment, the parties in interest took pains to reaffirm section 1708['s grant of state jurisdiction]")). In other words, even if the

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[26] All of these sections relate to the acquisition by the Secretary of the Interior of the Settlement Lands and their conveyance to the State Corporation.

Settlement Lands are Indian country as the Tribe contends (a conclusion on which the Court takes no position), that fact alone would not necessarily strip the State of power to enforce the Cigarette Tax Scheme as to cigarettes sold at the Smoke Shop.[27] Likewise, a determination that the Settlement Lands are not Indian country would not inexorably compel the conclusion that the State may enforce these laws. As Judge Selya pointed out so presciently, the Tribe's retained rights of sovereignty exist as a counterweight to the jurisdictional power asserted by the State, and issues, as they arise, must be decided by the measurement and balancing of those rights in the specific factual context of each case. Consequently, the question of whether the Settlement Lands are Indian country must be left for future litigation, or clarification by Congress.

2. The "Tribe"/"Land" Distinction

The Tribe's second contention is that section 1708 confers no power to the State over the Tribe itself. From this, the Tribe essentially concludes that the State is without authority to enforce the Cigarette Tax against the Tribe because it is the Tribe that is selling the cigarettes, not simply Indians or non-tribal members using the land.

In fact, the distinction between the State's power over the Settlement Lands and its power over the Tribe itself is the primary theme resounding throughout the submissions of the Tribe and its amicus supporters. *See, e.g.*, Pl. S.J. Mem. at 22-29, 64-69; Pl. Reply Mem. at 36-39; *see also* ACLU Amicus Curiae Mem. at 8-10; Prof. Gavin Clarkson Amicus

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[27] This position is essentially conceded by the ACLU. If Rhode Island "may have more authority in Indian country than some other states," then it remains for this Court to determine whether that "more" is broad enough to encompass the power to enforce the Cigarette Tax.

Curiae Mem. at 15-16. And it is in the consideration of this argument that the Court conducts the "particularized inquiry" called for in *Narragansett Indian Tribe,* balancing the Tribe's claim of sovereignty against the interests of the State. 19 F.3d at 705 (citing *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 145 (1980)).

The Tribe relies heavily on *Maynard v. Narragansett Indian Tribe,* 798 F. Supp. 94 (D.R.I. 1992), *aff'd,* 984 F.2d 14 (1st Cir. 1993). *Maynard* involved a claim by a private landowner whose land abutted the Settlement Lands against the Tribe for alleged harassment of the landowner's invitees. Plaintiff Maynard argued that the Tribe had waived its sovereign immunity from suit by agreeing to the condition in the JMOU that eventually resulted in section 1708. Senior Judge Pettine disagreed:

> Jurisdiction over tribal lands simply does not confer jurisdiction over the tribe itself. . . . [I]t is clear that § 1708 does not waive or abrogate the Tribe's sovereign immunity. Any waiver or abrogation of sovereign immunity must be expressly and clearly stated; § 1708 does not contain such a waiver.

798 F. Supp. at 97-98 (footnote omitted). In affirming the dismissal, the First Circuit held that "[t]he Tribe's surrender of its right to sue for non-settlement lands neither says nor implies anything about a surrender of its sovereign immunity from suit relating to its territorial or extraterritorial actions." 984 F.2d at 16. *Maynard,* therefore, stands for the now widely accepted proposition that section 1708 is not a waiver or abrogation of the Tribe's sovereign immunity from suit. Since it is the Tribe which brought this action (and since the State's Complaint has been dismissed for want of jurisdiction), the Court is not asked to infer anything with respect to a waiver of sovereign immunity from suit; that issue is not before the Court. *See McClendon v. United*

States, 885 F.2d 627, 630 (9th Cir. 1989) ("Initiation of a lawsuit necessarily establishes consent to the court's adjudication of the merits of that particular controversy.").

But the Tribe seeks to ascribe to *Maynard* a more far-reaching proposition that section 1708 is wholly inapplicable to any situation in which tribal sovereign immunity is asserted as a defense. This Court cannot agree with this sweeping interpretation. In fact, the *Maynard* district court did not endorse the argument advocated by counsel for the Tribe — that the Tribe, by virtue of its status as a sovereign political entity, may engage in virtually any activity it pleases and may do so with impunity, unaffected by the laws of any other sovereign, so long as it labels the activity "tribal." Senior Judge Pettine put it this way:

> Section 1708 purports to give the state jurisdiction over settlement lands. The parameters of this jurisdictional grant are vague; the Tribe believes the entire section is moot. However, an example may be helpful. While the Court holds that § 1708 does not give jurisdiction over the Tribe *qua* tribe, it is fair to say that the state would have jurisdiction over a murder committed on Indian (settlement) land.

798 F. Supp. at 97 n.3. Thus, under Judge Pettine's analysis, when the Tribe acts "*qua* Tribe," that is, as the political entity responsible for governing the Narragansetts, it is not subject to the State's civil and criminal laws and jurisdiction.

This, of course, is sensible because "Indian tribes are 'distinct, independent *political* communities, retaining their original natural rights' *in matters of local governance*." *Narragansett Indian Tribe*, 19 F.3d at 701 (citing *Santa Clara Pueblo*, 436 U.S. at 55) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)) (emphasis supplied). These retained rights of sovereignty in matters of local governance "include[ ] the power of Indians to make

and enforce their own substantive law in internal matters, including matters such as membership rules, inheritance rules, and the regulation of domestic relations." *Id.* And the Tribe's retained rights of sovereignty comprise a host of other governmental and political powers far too numerous to list here, all of which relate directly to "the regulation by [the Tribe] of [its] own domestic affairs [and] the maintenance of order and peace among [its] own members by the administration of [its] own laws and customs." *Ex Parte Crow Dog,* 109 U.S. 556, 568 (1883); *see also Hicks,* 533 U.S. at 361 (Indian sovereignty involves "the principle that Indians have the right to make their own laws and be governed by them"); Felix S. Cohen, *Handbook of Federal Indian Law* 122 (1988) ("Indian self-government, the decided cases hold, includes the power of an Indian tribe to adopt and operate under a form of government of the Indians' choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice.").

So it is not unreasonable to conclude that the power of the State to enforce its criminal laws on tribal land is not without some limitation or boundary, by virtue of the Tribe's retained rights of sovereignty. There may possibly be situations in which the State's criminal regulatory enforcement powers encroach on matters directly impacting the Tribe's sovereignty. But, having alluded above to the broad range of activities that are widely believed to fall within the classification "matter of local governance," that phrase is not, as the Tribe would have it, a meaningless relativism. It is folly to suggest (as the Tribe does) that a "matter of local governance" encompasses every conceivable act to which the stamp "Tribe-approved" is affixed. Rather, case by case, the "sturdiness" of the Tribe's retained

sovereignty is (and, no doubt, will continue to be) perpetually re-tested and balanced against the particular jurisdictional power asserted by the State–"that is the nature of litigation." *Narragansett Indian Tribe,* 19 F.3d at 705.

In this litigation, the narrow issue is whether the Tribe may operate a retail cigarette store without complying with the applicable state tax laws and without fear of enforcement of these laws. It seeks a declaration that it may conduct this and any other retail operation[28] unsaddled by the yoke of enforcement of the State's tax laws and regulations. But the Tribe cannot avoid enforcement of the law merely by asserting categorically that the decision to engage in the activity was made by the tribal government. Operating a for-profit business enterprise, such as the Smoke Shop, may well be a lucrative source of revenue for the Tribe, and nothing said here should be construed as disparaging the Tribe's right to engage in activities which develop and improve its economic weal. The question, however, is whether the activity in which the Tribe is engaged (in this case, the retail sale of cigarettes) is one that fundamentally sounds in core sovereign functions of the Tribe, and if so, whether the obligation imposed by the State, via the Cigarette Tax Scheme and the criminal jurisdiction as to the Settlement Lands vested by section 1708, improperly impinges upon the Tribe's retained sovereignty.[29]

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[28] Although the Tribe requests a declaration with respect to the retail sale of "any other products this Court deems just," this Court declines the invitation to address any activity other than the one presented in this case-the retail sale of cigarettes at the Smoke Shop. To delve into other retail activities would likely constitute a "gratuitous exploration of uncharted constitutional terrain." *El Dia,* 963 F.2d at 494.

[29] It is possible to infer from the Tribe's submissions the alternative argument that section 1708 applies only to the Settlement Lands themselves, but not to persons acting on the Settlement Lands. This

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Akins v. Penobscot Nation, 130 F.3d 482 (1st Cir. 1997) provides a useful framework for answering this question in this and future cases. In *Akins*, the First Circuit considered the definition and scope of the phrase "internal tribal matters," as used in the Maine state act implementing the federal Maine Indian Claims Settlement Act of 1980 ("Maine Settlement Act").[30] The specific language of the Maine implementing act made the Penobscot Nation subject "to all the duties, obligations, liabilities and limitations of a municipality . . . provided, however, that internal tribal matters . . . shall not be subject to regulation by the State." *Id.* at 485 (citing Me. Rev. Stat. Ann. tit. 30, § 6206(1)). Plaintiff Akins, an Alabama resident and member of the Penobscot Nation, sued the Nation over its policy of prohibiting anyone from obtaining "stumpage," or logging, permits who was not both a Nation member and Maine resident. *Id.* at 483-84. Because the Maine Settlement Act provided that "the Nation is subject to the laws of Maine," the question for the First Circuit was whether the issuance of stumpage permits was an "internal tribal matter." "Put

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position, if indeed it is espoused, is nonsensical. The Settlement Lands cannot be prosecuted for violating the State's law against murder, or sued for discriminating against an employee on the basis of sex, or made to comply with zoning ordinances. If section 1708 is to have any meaning, it must apply (or not) to persons acting or present upon the Settlement Lands. *Cf. Narragansett Indian Tribe*, 19 F.3d at 705 ("The crucial questions which must yet be answered principally deal with the nature of the regulable activities which may-or may not-be subject to state control, *e.g.*, zoning, traffic control, advertising, lodging.").

[30] The Maine Indian Claims Settlement Act, whose history is recounted in *Akins*, had its genesis in claims by members of various Indian tribes to ancestral lands located in Maine. 130 F.3d at 484. As in Rhode Island, the tribes and Maine negotiated a settlement which was codified under Maine and federal law.

differently, the Nation in certain capacities functions as a municipality of Maine and is reachable under state and federal law in that capacity, *but when it functions as a tribe as to internal tribal matters, it is not.*" *Id.* at 485 (emphasis supplied).

The court turned first to the Maine state implementing statute, which provided a non-exclusive list of "internal tribal matters."[31] None of the "exemplars" listed, including "tribal government," properly encompassed the stumpage permit policy. The First Circuit noted, as this writer has above, that merely because "a tribe attempts to govern a matter does not render it an internal tribal matter." *Id.* at 486. More is required to envelop an activity in the shroud of tribal sovereign immunity.

To resolve the matter, the court set out a five-factor test designed to gauge whether a particular activity could be considered an "internal tribal matter," leading to the conclusion that the stumpage policy so qualified:

> First, and foremost, the policy purports to regulate only members of the tribe, as only tribal members may even apply for permits. The interests of non-members are not at issue. . . . Second, the policy has to do with the commercial use of lands acquired by the Nation with the federal funds it received for this purpose as part of the settlement agreement. . . . Third, the policy concerns the harvesting of a natural resource from that land; and permit fees benefit the Penobscot Nation. The control of the permitting

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[31] These were "membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income." *Id.* at 486 (citing Me. Rev. Stat. Ann. tit. 30, § 6206(1)).

> process operates as a control over the growth, health, and reaping of that resource. Fourth, the policy, at least on its face, does not implicate or impair any interest of the state of Maine. Fifth, it is consistent with prior legal understandings to view the issuance of stumpage permits as an internal tribal matter.

Id. at 486-87. The First Circuit supported the factors it had selected by observing that the stumpage policy

> is not a dispute between Maine and the Nation over the attempted enforcement of Maine's laws. . . . This is instead a question of allocation of jurisdiction among different fora and allocation of substantive law to a dispute between tribal members where neither the Congress nor the Maine Legislature has expressed a particular interest.

Id. at 487-88.

The operation of the Smoke Shop, when measured against the *Akins* factors, compels a different conclusion. While it is true that the Smoke Shop is on tribal land, and its revenues support the Tribe, in virtually every other aspect the Smoke Shop fails the *Akins* test. The interests of tribal non-members (*e.g.*, the great majority of Smoke Shop customers who seek to avoid the Cigarette Tax, as well as the general citizenry of Rhode Island) are directly affected by the Tribe's decision not to comply with the Cigarette Tax Scheme. Cigarette buyers avoid taxes that they owe; and the general public picks up the tab for lost state revenue in the form of higher taxes. The Smoke Shop is also in no way especially connected with the "commercial use of" the Settlement Lands themselves,[32] or the regulation of harvesting of any

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[32] Although it may be true that the Smoke Shop is a commercial enterprise situated on Settlement Lands, there is no particular nexus (as

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natural resource on those lands. And it need hardly be said that this case directly affects (or "implicates or impairs") the interests of the state of Rhode Island. By *Akins'* standards, therefore, the operation of the Smoke Shop without question would not be considered an "internal tribal matter" under the Maine Settlement Act.

At oral argument, counsel for the Tribe attempted to distinguish and isolate *Akins* on the ground that the history and language of the Maine Settlement Act is unique. It is true that the Maine Settlement Act contains detailed and extensive instructions on the limits of jurisdictional authority that may be exercised, respectively, by the governments of the United States, Maine, and the several subject Indian tribes. *See* 25 U.S.C. § 1725(a)-(i). And it is also true that the scope of what properly may be categorized as an "internal tribal matter" may or may not be co-extensive with the classification "retained right of sovereignty." However, irrespective both of the Maine Settlement Act's uniqueness, and of the possible subtleties in meaning distinguishing the phrases "internal tribal matter" and "retained right of sovereignty,"[33] the *Akins* factors provide valuable direction to courts seeking to draw the line between sovereign and non-sovereign activities. At stake in this case is not the alleged right of the Tribe to govern its own members, but rather the

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there was in *Akins*) between the operation of the Smoke Shop and the subject lands. *Cf. id.* at 487 ("The policy regulates the very land that defines the territory of the Nation, and so appears to be a 'tribal' matter.").

[33] In fact, this Court does not believe that there is a significant difference between these concepts. In *Akins*, the Penobscot Nation supported its interpretation of "internal tribal matters" by contending that it should be free to "exercise its residual sovereignty" to further its economic interests. 130 F.3d at 487. That is essentially the Tribe's position here.

alleged right to provide a tax windfall to cigarette consumers at the State's expense. It is not a close call. If, as has already been held, the jurisdictional grant to the State over the Settlement Lands vested by section 1708 is "rather broad," *Narragansett Indian Tribe,* 19 F.3d at 701, it surely reaches the Tribe's unlawful attempt to offer consumers a means to bypass the Cigarette Tax which would not otherwise be available to them off of the Settlement Lands.

In sum, whether a "retained right of sovereignty," as used in the context of Indian law and as applied in this case, may shield a particular activity from the enforcement of State law, comes down to this: whether the persons affected by the particular activity in which a tribe is engaged are tribal members; and whether the activity may properly be described as "governmental" in nature (*i.e.* when the Tribe acts "*qua* Tribe"). The Tribe's decision to operate the Smoke Shop, without complying with the Cigarette Tax Scheme's obligations with respect to acquiring and affixing tax stamps, fails to satisfy either criterion. This activity (1) directly and primarily affects non-members, and (2) is not inherently governmental or political in nature, for all of the reasons discussed previously. Operating the Smoke Shop while avoiding the obligations imposed by the State's Cigarette Tax is not a right of sovereignty retained by the Tribe, and the State consequently may enforce the Cigarette Tax by lawful entry onto the Settlement Lands and seizure of contraband cigarettes.[34]

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[34] It is possible (and perhaps worthwhile) to engage in a debate about whether less intrusive means were available to the State to enforce its tax scheme, means which would have been more respectful of the Tribe's sovereignty. For example, it is possible that the cigarettes could have been seized before they entered tribal land, as in *Colville;* or, perhaps, the State could have sought enforcement through a civil action in lieu of invading the Settlement Lands and seizing the contraband. While this

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IV. Conclusion

For the foregoing reasons, the State's Complaint is dismissed and remanded to Washington County Superior Court for lack of subject matter jurisdiction. As to the federal action, Plaintiff's Motion for Summary Judgment is DENIED, and Defendants' Motion for Summary Judgment is GRANTED. Furthermore, the Court makes the following declarations: (1) the legal incidence of the State's Cigarette Tax falls on the consumer, and not the Tribe; (2) the State did not violate federal law or the Tribe's sovereign rights when it enforced its criminal statutes by executing a search warrant, and making arrests pursuant to that warrant, on tribal land; and (3) the Tribe must comply with the Cigarette Tax if it wishes to continue to sell cigarette products on the Settlement Lands.

IT IS SO ORDERED.

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debate may indeed be a legitimate and necessary one, this writer is of the view that imposition of a "less intrusive means" test is unwarranted under the facts presented by this case. This is not to say, however, that in some context or set of facts yet to be tested, the State's authority to conduct invasive raids upon tribal land might not be so circumscribed by this Court. In other words, nothing in this opinion should be read to suggest that the State's ability to enter upon tribal land to enforce its criminal/regulatory laws is limitless, or that State authorities may act with impunity. It is not; and they may not.

Appendix E

STATUTORY PROVISIONS INVOLVED

TITLE 25 – INDIANS

CHAPTER 19 – INDIAN LAND CLAIMS SETTLEMENTS

SUBCHAPTER I – RHODE ISLAND INDIAN CLAIMS SETTLEMENT

Part A – General Provisions

Sec. 1701. Congressional findings and declaration of policy

Congress finds and declares that –

(a) there are pending before the United States District Court for the District of Rhode Island two consolidated actions that involve Indian claims to certain public and private lands within the town of Charlestown, Rhode Island;

(b) the pendency of these lawsuits has resulted in severe economic hardships for the residents of the town of Charlestown by clouding the titles to much of the land in the town, including lands not involved in the lawsuits;

(c) the Congress shares with the State of Rhode Island and the parties to the lawsuits a desire to remove all clouds on titles resulting from such Indian land claims within the State of Rhode Island; and

(d) the parties to the lawsuits and others interested in the settlement of Indian land claims within the State of Rhode Island have executed a Settlement Agreement which requires implementing legislation by the Congress of the United States and the legislature of the State of Rhode Island.

Sec. 1702. Definitions

For the purposes of this subchapter, the term –

(a) "Indian Corporation" means the Rhode Island nonbusiness corporation known as the "Narragansett Tribe of Indians";

(b) "land or natural resources" means any real property or natural resources, or any interest in or right involving any real property or natural resource, including but not limited to, minerals and mineral rights, timber and timber rights, water and water rights, and rights to hunt and fish;

(c) "lawsuits" means the actions entitled "Narragansett Tribe of Indians v. Southern Rhode Island Land Development Co., et al., C.A. No. 75-0006 (D.R.I.)" and "Narragansett Tribe of Indians v. Rhode Island Director of Environmental Management, C.A. No. 75-0005 (D.R.I.)";

(d) "private settlement lands" means approximately nine hundred acres of privately held land outlined in red in the map marked "Exhibit A" attached to the Settlement Agreement that are to be acquired by the Secretary from certain private landowners pursuant to sections 1704 and 1707 of this title;

(e) "public settlement lands" means the lands described in paragraph 2 of the Settlement Agreement that are to be conveyed by the State of Rhode Island to the State Corporation pursuant to legislation as described in section 1706 of this title;

(f) "settlement lands" means those lands defined in subsections (d) and (e) of this section;

(g) "Secretary" means the Secretary of the Interior;

(h) "settlement agreement" means the document entitled "Joint Memorandum of Understanding Concerning

Settlement of the Rhode Island Indian Land Claims", executed as of February 28, 1978, by representatives of the State of Rhode Island, of the town of Charlestown, and of the parties to the lawsuits, as filed with the Secretary of the State of Rhode Island;

(i) "State Corporation" means the corporation created or to be created by legislation enacted by the State of Rhode Island as described in section 1706 of this title; and

(j) "transfer" includes but is not limited to any sale, grant, lease, allotment, partition, or conveyance, any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance, or any event or events that resulted in a change of possession or control of land or natural resources.

Sec. 1703. Rhode Island Indian Claims Settlement Fund; establishment

There is hereby established in the United States Treasury a fund to be known as the Rhode Island Indian Claims Settlement Fund into which $3,500,000 shall be deposited following the appropriation authorized by section 1710 of this title.

Sec. 1704. Option agreements to purchase private settlement lands

(a) Acceptance of option agreement assignments; reasonableness of terms and conditions

The Secretary shall accept assignment of reasonable two-year option agreements negotiated by the Governor of the State of Rhode Island or his designee for the purchase of the private settlement lands: Provided, That the terms and conditions specified in such options are reasonable and that the total price for the acquisition of such lands, including

reasonable costs of acquisition, will not exceed the amount specified in section 1703 of this title. If the Secretary does not determine that any such option agreement is unreasonable within sixty days of its submission, the Secretary will be deemed to have accepted the assignment of the option.

(b) Amount of payment

Payment for any option entered into pursuant to subsection (a) of this section shall be in the amount of 5 per centum of the fair market value of the land or natural resources as of the date of the agreement and shall be paid from the fund established by section 1703 of this title.

(c) Limitation on option fees

The total amount of the option fees paid pursuant to subsection (b) of this section shall not exceed $175,000.

(d) Application of option fee

The option fee for each option agreement shall be applied to the agreed purchase price in the agreement if the purchase of the defendant's land or natural resources is completed in accordance with the terms of the option agreement.

(e) Retention of option payment

The payment for each option may be retained by the party granting the option if the property transfer contemplated by the option agreement is not completed in accordance with the terms of the option agreement.

Sec. 1705. Publication of findings

(a) Prerequisites; consequences

If the Secretary finds that the State of Rhode Island has satisfied the conditions set forth in section 1706 of this title, he shall publish such findings in the Federal Register and upon such publication –

(1) any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, and any transfer of land or natural resources located anywhere within the town of Charlestown, Rhode Island, by, from, or on behalf of any Indian, Indian nation, or tribe of Indians, including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790, ch. 33, sec. 4, 1 Stat. 137, and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in subsection (a) of this section may involve land or natural resources to which the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, had aboriginal title, subsection (a) of this section shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision

thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

(b) Maintenance of action; remedy

Any Indian, Indian nation, or tribe of Indians (other than the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof) whose transfer of land or natural resources was approved or whose aboriginal title or claims were extinguished by subsection (a) of this section may, within a period of one hundred and eighty days after publication of the Secretary's findings pursuant to this section, bring an action against the State Corporation in lieu of an action against any other person against whom a cause may have existed in the absence of this section. In any such action, the remedy shall be limited to a right of possession of the settlement lands.

Sec. 1706. Findings by Secretary

Section 1705 of this title shall not take effect until the Secretary finds –

(a) that the State of Rhode Island has enacted legislation creating or authorizing the creation of a State chartered corporation satisfying the following criteria:

(1) the corporation shall be authorized to acquire, perpetually manage, and hold the settlement lands;

(2) the corporation shall be controlled by a board of directors, the majority of the members of which shall be selected by the Indian Corporation or its successor, and the remaining members of which shall be selected by the State of Rhode Island; and

(3) the corporation shall be authorized, after consultation with appropriate State officials, to establish its own regulations concerning hunting and fishing on the settlement lands, which need not comply with regulations of the State of Rhode Island but which shall establish minimum standards for the safety of persons and protection of wildlife and fish stock; and

(b) that State of Rhode Island has enacted legislation authorizing the conveyance to the State Corporation of land and natural resources that substantially conform to the public settlement lands as described in paragraph 2 of the Settlement Agreement.

Sec. 1707. Purchase and transfer of private settlement lands

(a) Determination by Secretary; assignment of settlement lands to State Corporation

When the Secretary determines that the State Corporation described in section 1706(a) of this title has been created and will accept the settlement lands, the Secretary shall exercise within sixty days the options entered into pursuant to section 1704 of this title and assign the private settlement lands thereby purchased to the State Corporation.

(b) Moneys remaining in fund

Any moneys remaining in the fund established by section 1703 of this title after the purchase described in subsection (a) of this section shall be returned to the general Treasury of the United States.

(c) Duties and liabilities of United States upon discharge of Secretary's duties; restriction on conveyance of settlement lands; affect on easements for public or private purposes

Upon the discharge of the Secretary's duties under sections 1704, 1705, 1706, and 1707 of this title, the United States shall have no further duties or liabilities under this subchapter with respect to the Indian Corporation or its successor, the State Corporation, or the settlement lands: Provided, however, That if the Secretary subsequently acknowledges the existence of the Narragansett Tribe of Indians, then the settlement lands may not be sold, granted, or otherwise conveyed or leased to anyone other than the Indian Corporation, and no such disposition of the settlement lands shall be of any validity in law or equity, unless the same is approved by the Secretary pursuant to regulations adopted by him for that purpose: Provided, however, That nothing in this subchapter shall affect or otherwise impair the ability of the State Corporation to grant or otherwise convey (including any involuntary conveyance by means of eminent domain or condemnation proceedings) any easement for public or private purposes pursuant to the laws of the State of Rhode Island.

Sec. 1708. Applicability of State law; treatment of settlement lands under Indian Gaming Regulatory Act

(a) In general

Except as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.

(b) Treatment of settlement lands under Indian Gaming Regulatory Act

For purposes of the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), settlement lands shall not be treated as Indian lands.

Sec. 1709. Preservation of Federal benefits

Nothing contained in this subchapter or in any legislation enacted by the State of Rhode Island as described in section 1706 of this title shall affect or otherwise impair in any adverse manner any benefits received by the State of Rhode Island under the Federal Aid in Wildlife Restoration Act of September 2, 1937 (16 U.S.C. 669-669(i)), or the Federal Aid in Fish Restoration Act of August 9, 1950 (16 U.S.C. 777-777(k)).

Sec. 1710. Authorization of appropriations

There is hereby authorized to be appropriated $3,500,000 to carry out the purposes of this subchapter.

Sec. 1711. Limitation of actions; jurisdiction

Notwithstanding any other provision of law, any action to contest the constitutionality of this subchapter shall be barred unless the complaint is filed within one hundred and eighty days of September 30, 1978. Exclusive jurisdiction over any

such action is hereby vested in the United States District Court for the District of Rhode Island.

Sec. 1712. Approval of prior transfers and extinguishment of claims and aboriginal title outside town of Charlestown, Rhode Island and involving other Indians in Rhode Island

(a) Scope of applicability

Except as provided in subsection (b) of this section –

(1) any transfer of land or natural resources located anywhere within the State of Rhode Island outside the town of Charlestown from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (other than transfers included in and approved by section 1705 of this title), including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, 1 Stat. 137), and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in paragraph (1) may involve land or natural resources to which such Indian, Indian nation, or tribe of Indians had aboriginal title, paragraph (1) shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of such transfers of land or natural resources effected by this subsection or an

extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by any such Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or rights involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy), shall be regarded as extinguished as of the date of the transfer.

(b) Exceptions

This section shall not apply to any claim, right, or title of any Indian, Indian nation, or tribe of Indians that is asserted in an action commenced in a court of competent jurisdiction within one hundred and eighty days of September 30, 1978: Provided, That the plaintiff in any such action shall cause notice of the action to be served upon the Secretary and the Governor of the State of Rhode Island.

Part B – Tax Treatment

Sec. 1715. Exemption from taxation

(a) General exemption

Except as otherwise provided in subsections (b) and (c) of this section, the settlement lands received by the State Corporation shall not be subject to any form of Federal, State, or local taxation while held by the State Corporation.

(b) Income-producing activities

The exemption provided in subsection (a) of this section shall not apply to any income-producing activities occurring on the settlement lands.

(c) Payments in lieu of taxes

Nothing in this subchapter shall prevent the making of payments in lieu of taxes by the State Corporation for services provided in connection with the settlement lands.

Sec. 1716. Deferral of capital gains

For purposes of title 26, any sale or disposition of private settlement lands pursuant to the terms and conditions of the settlement agreement shall be treated as an involuntary conversion within the meaning of section 1033 of title 26.

Appendix F

JOINT MEMORANDUM OF UNDERSTANDING CONCERNING SETTLEMENT OF THE RHODE ISLAND INDIAN LAND CLAIMS

All parties to *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Co., et al.*, C.A. No. 75-0006 (USDC, DRI) and *Narragansett Tribe of Indians v. Rhode Island Director of Environmental Management*, C.A. No. 75-0005 (USDC, DRI) (together called "the Lawsuits") and the other undersigned persons interested in the settlement of Indian land claims within the State of Rhode Island hereby agree to the following principles and provisions of settlement which are, except for the provisions of section 18 below, to be considered as inseparable, dependent requirements and which are all conditioned upon requisite, favorable and timely action by the appropriate executive and legislative branches of the governments of the State of Rhode Island and the United States of America:

1. That a state chartered corporation (the "State Corporation") will be created with an irrevocable charter for the purpose of acquiring, managing and permanently holding the lands defined in Sections 2 and 3 below (the "Settlement lands"); the State Corporation will be controlled by a board of directors, the majority of whose members will be chosen by a Rhode Island corporation known as "the Narragansett Tribe of Indians" (the "Indian Corporation") or its successor and the remaining members chosen by the State of Rhode Island.

2. That the State of Rhode Island will contribute the Indian Cedar Swamp, the Indian Burial Hill, the land around Deep Pond, and an easement from Kings Factory Road to Watchaug Pond to the State Corporation. These public portions of the Settlement Lands total approximately 900

acres. Contribution of the State land around Deep Pond is subject to the restrictions set forth below in section 17.

3. That the Settlement Lands will also include approximately 900 acres of land located within the area outlined in red on the map attached hereto marked Exhibit A. The Settlement Lands shall specifically include those lands held by the defendants named in the Lawsuits which are enumerated on the schedule attached hereto as Exhibit B. These privately held portions of the Settlement Lands shall be acquired at fair market value established without regard to the pendency of the Lawsuits. No private landowner shall be required to convey any land hereunder without his or her consent, which shall be deemed to have been given upon execution of a mutually acceptable option agreement (the "Option"). Any landowner executing an Option shall be paid a nonrefundable option fee by the federal government equal to 5 percent of the purchase price for a 2-year option. The optionee shall have the right to renew the option for one additional year for a renewal fee paid by the federal government of 2.5 percent of the purchase price.

4. That the parties to the Lawsuits will support efforts to obtain deferral of both State and Federal income taxes resulting from the conveyance of privately held portions of the Settlement Lands.

5. That the Federal government will provide the funds, in an amount not in excess of $3.5 million, to acquire the privately held portions of the Settlement Lands.

6. That Federal Legislation shall be obtained that eliminates all Indian claims of any kind, whether possessory, monetary or otherwise, involving land in Rhode Island, and effectively clears the titles of landowners in Rhode Island of any such claim. This Federal Legislation shall be in form and substance as set forth in the proposed statutory language attached hereto as Exhibit C, unless otherwise agreed by

counsel for the private Defendants in the Lawsuit. This legislation shall not purport to affect or eliminate the claim of any individual Indian which is pursued under any law generally applicable to non-Indians as well as Indians in Rhode Island.

7. That the Settlement Lands shall be subject to a special Federal restriction against alienation, provided that nothing in the federal restriction or in any other aspect of this memorandum shall affect the ability of the State Corporation to grant or otherwise convey (whether voluntary or involuntary, including any eminent domain or condemnation proceedings) easements for public or private purposes.

8. That the Settlement Lands will be held in trust by the State Corporation for the benefit of the descendants of the 1880 Rhode Island Narragansett Roll.

9. That the Settlement Lands will not be subject to local property taxation.

10. That the Federal Government will reimburse the private defendants in the lawsuits for costs incurred or paid for legal services and disbursements in connection with the lawsuits with respect to any lands involved in the Lawsuits which are not specified in Exhibit B and for which an Option is not executed.

11. That the State Corporation will have the right (after consultation with appropriate state officials) to establish its own regulations concerning hunting and fishing on the Settlement Lands without being subject to state regulations, but shall impose minimum standards for safety of persons and protection of wildlife and fish stock.

12. All the Settlement Lands contributed by the State will be permanently held for conservation purposes by the State Corporation.

13. That, except as otherwise specified in this Memorandum, all laws of the State of Rhode Island shall be in full force and effect on the Settlement Lands, including but not limited to state and local building, fire and safety codes.

14. That all Settlement Lands will be subject to a professionally prepared land use plan (the "Land Use Plan") mutually acceptable to the State Corporation and the Town Council. Acceptance of the Land Use Plan shall not be unreasonably withheld by the Town Council. At least seventy-five percent of the Settlement Lands not already committed to conservation purposes by Section 12 above will be permanently subjected to conservation uses by the land use plan. Town council acceptance of the Land Use Plan shall be a condition precedent to the acquisition of the Settlement Lands by the State Corporation. The town council, after its acceptance of the land use plan, shall amend the zoning ordinance of the town of Charlestown in a manner consistent with the Land Use Plan as it applies to the Settlement Lands. Thereafter, the zoning ordinance, as amended to conform with the Land Use Plan, shall control the use of the Settlement Lands and shall not be further amended in a manner inconsistent with the Land Use Plan without the consent of the State Corporation.

15. That the plaintiff in the Lawsuits will not receive federal recognition for purposes of eligibility for Department of the Interior services as a result of Congressional implementation of the provisions of this Memorandum, but will have the same right to petition for such recognition and services as other groups.

16. That the town of Charlestown will be reimbursed for future services provided in connection with the Settlement Lands with funds provided by the Indian corporation.

17. That contribution by the State of the land around Deep Pond is conditioned upon required and appropriate

Federal approval of any conveyance of said land in such manner so as not to affect, in any adverse manner, any benefits received by the State under the Pittman-Robertson Act (16 U.S.C. § 669-669i) and the Dingell-Johnson Act (16 U.S.C. § 777-777k), and further conditioned upon the retention of permanent State control of and public access to an adequate fishing area within said land.

18. That implementation of all provisions of this Memorandum, except those of Sections 6, 10 and 19, and the payment of the option fees provided for in Section 3 above shall be contingent upon a prompt determination by the Department of the Interior that the Plaintiff in the Lawsuits have a credible claim to the lands involved in the Lawsuits. Plaintiff shall have an opportunity for judicial review of any adverse determination by the Department of the Interior.

19. The Plaintiffs in the Lawsuits agree to cause the Lawsuits to be dismissed with prejudice at the time the portion of the Federal legislation which eliminates title problems pursuant to Section 6 above becomes effective.

Witness the execution hereof under seal as of this twenty-eighth day of February 1978.

HON. J. JOSEPH GARRAHY,
Governor of State of Rhode Island and Providence Plantations.

J. JOSEPH GARRAHY
TOWN OF CHARLESTOWN, RHODE ISLAND
TOWN COUNCIL
By CHARLES MCLEAN

Plaintiff:

NARRAGANSETT TRIBE OF INDIANS
BY THEIR ATTORNEYS,
NATIVE AMERICAN RIGHTS FUND
By THOMAS N. TUREEN

Defendants:

EDWARD WOOD, RHODE ISLAND DIRECTOR OF ENVIRONMENTAL MANAGEMENT
WILLIAM GRANFIELD BRODY,
Assistant Attorney General,
State of Rhode Island.

DAVID F. GIULIANO.
PAUL E. BENNETT.
ALFRED TESTA.

By GOODWIN, PROCTER & HOAR,
their attorneys.
DONALD P. QUINN.

Robert E. Cherry, Castle Realty Company, Glenn F. Godden, Mildred L. Godden, John S. Johnson, Alice Johnson, Ethel W. Duguid, Providence Boys Club, Greater Providence Young Mens Christian Association, Sarah J. Browning, William F. Arnold, Ruth Arnold, Thomas L. Arnold, William Arnold, Frank W. Arnold and the Washington Trust Company as trustees for the Estate of Frank Arnold, Thomas L. Arnold, Laurence Whittemore and the Washington Trust Company as trustees for the Thomas L. Arnold Trust, Hope W. Hallock, Edna May McKenzie, Lloyd E. Fitzgerald, Joyce M. Fitzgerald, Edward A. Whipple, Pauline Whipple.

By TILLINGHAST, COLLINS & GRAHAM.
their attorneys.

JAMES A. JACKSON.
SOUTHERN RHODE ISLAND LAND DEVELOPMENT CORP.,
by its attorney.
By ARCHIBALD B. KENYON, JR.
FRANKLIN SHORES, INC.,
by its attorney.

Appendix G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

NARRAGANSETT INDIAN TRIBE,
Plaintiff,

v. C.A. No. 03-296S

STATE OF RHODE ISLAND, ET AL.,
Defendants

STIPULATED FACTS

1. The Narragansett Indian Tribe (the "Tribe") is a federally recognized Indian Tribe with Settlement Lands (defined at 25 U.S.C. § 1701, *et seq.*) located within Charlestown, Rhode Island and currently held in trust by the United States.

2. The Settlement Lands were established as a result of the settlement of a lawsuit through a Joint Memorandum of Understanding (the "JMOU) among the Tribe, the State of Rhode Island (the "State"), the Town of Charlestown (the "Town") and others, and by 25 U.S.C. § 1701 *et seq.* [P.L. 95-395, 92 Stat. 813].

3. The Narragansett Indian Smoke Shop (the "Smoke Shop") was constructed in the spring of 2003. The Smoke Shop was constructed upon the Settlement Lands located just off Route 2 in Charlestown.

4. Prior to the opening of the Smoke Shop, unstamped cigarettes were imported by the Tribe from outside the State and stored for sale by the Tribe in the Smoke Shop.

The Tribe did not obtain the unstamped cigarettes from a manufacturer, did not offer them for resale, or from vending machines.

5. The Tribe passed a Resolution approving the opening and operation of the Smoke Shop for the purpose of producing income for the Tribe.

6. State requires several permits and licenses to conduct retail sales of cigarettes in Rhode Island. Such a business is required to have, among others, a retail sales tax permit (R.I. Gen. Laws § 44-19-1), a license to sell cigarettes (R.I. Gen. Laws § 44-20-02), and a Sunday sales permit from the municipality (R.I. Gen. Laws § 5-23-2).

7. On Saturday, July 12, 2003 the Smoke Shop was opened to conduct sales at retail and offered unstamped and untaxed cigarettes to the general public. Cigarettes were sold without the required State tax stamps, or the collection of the 7% retail sales tax by the individuals operating the store. The untaxed cigarettes were sold at prices below the minimum established by state law. (R.I. Gen. Laws § 6-31-1 *et seq.*). A substantial amount of these cigarettes were sold to non-members of the Tribe.

8. In addition, the Smoke Shop was operated without any State licenses or permits, including the State Sales Tax Permit, a Cigarette Dealer's License, or a Sunday Sales Permit.

9. The sale of untaxed and unstamped cigarettes continued during business hours from the opening of the Smoke Shop on Saturday, July 12, 2003 until Monday, July 14, 2003 when the remaining unstamped cigarettes offered for sale were seized by the State pursuant to a search warrant issued by an associate judge of the Rhode Island District Court. The State has a Return of Service with an inventory of the cigarettes seized.

10. The Chief Sachem, three (3) Tribal Council members, a Tribal Law Enforcement Officer and three (3) other Tribal members were arrested during the execution of the search warrant on July 14, 2003.

11. The State Tax Administrator has a program to collect the applicable cigarette tax from consumers who have purchased unstamped cigarettes pursuant to state law and the federal Jenkins Act.

12. The Tribe seeks to continue selling cigarette products on the Settlement Lands free from state taxation.

Respectfully submitted,

Plaintiffs,

Narragansett Tribe of Indians
By Their Attorneys,

/s/
John F. Killroy J., #3761
74 Main Street
Wakefield, RI 02879
(401) 783-6840
(401) 782-2490 Fax

/s/
Douglas J. Luckerman, Esq.
Outlook Drive
Lexington, MA 02421
(781) 861-6535

Defendants,

State of Rhode Island
By Its Attorney,

Patrick C. Lynch
Attorney General

Governor Donald Carcieri
By His Attorney,

/s/
Neil F. X. Kelly, #4515
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/s/
Claire Richards, #4057
Special Counsel
Room 119, The State House
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(401) 222-8114
(401) 222-8091 Fax

TOWN OF CHARLESTOWN
and CHARLESTOWN
POLICE DEPARTMENT
By Their Attorneys,

/s/
Joseph S. Larisa, Jr., #4113
Assistant Solicitor
1 Citizens Plaza, Suite 1100
Providence, RI 02903
(401) 743-4700

Appendix H

State of Rhode Island and Providence Plantations
Complaint to Search and Seize Property / or Person

TO _____ Justice of the Supreme, Superior Court, or Judge of the District Court of the State of Rhode Island.

a) Cpl. Donald F. Devine, Jr. _____, Member of the Division of State Police.

b) _____, a person authorized by law to bring complaints for violation of the law which it is my responsibility to enforce/a person who has a right to possession of the property stolen, embezzled, or obtained by false pretense or pretenses:

ON OATH COMPLAINS THAT:

(1) Certain property has been stolen or embezzled, or obtained by false pretenses, or pretenses, with intent to cheat or defraud within this state or elsewhere.

(2) Certain property has been kept, suffered to be kept, concealed, deposited, or possessed in violation of law, or for the purpose of violating the law;

(3) Certain property is designed or intended for use, or is or has been used in violation of law, or as a means of committing a violation of law;

(4) _____

and prays that a warrant to search for and seize said property/person be issued and if the same be subject to forfeiture, that the property be forfeited.

The person/property or articles to be searched for and/or seized is described as follows:

Cartons of cigarettes, United States Currency, paperwork, items, computers or documents showing ownership or control of the premises.

The name of the owner or keeper, thereof (if known) is: Matthew Thomas Chief of the Narragansett Indians.

The place or person to be searched is described as follows: Opposite 4510 South County Trial, Charlestown, Rhode Island, described as a tan aluminum trailer, approximately 25 feet in length, 2 front gray doors, wooden ramp, wooden stairs and a large sign on the roof proclaiming Narragansett Smoke Shop.

Your complainant prays that said warrant may be served in the night time for the reason that: _____

Subscribed and sworn to before me:

July 12, 2003
Date

/s/
Judge

/s/
Complainant

Search Warrant

State Ex rel	Member of the Rhode Island State Police Cpl. Donald F. Devine, Jr.	County: Washington
vs. Respondent Opposite pole 4510 South County Trail, Charlestown, Rhode Island described as a tan aluminum trailer, approximately 25 feet in length, 2 front gray doors, wooden ramp, wooden stairs, large sign on the roof Narragansett Smoke Shop		TO: An officer authorized by law to execute the within warrant, _____

Complaint and affidavit having been made to me under oath, _____ and as I am satisfied that there is probable cause for the belief therein set forth that grounds for issuing a search warrant exist, you are hereby commanded diligently to search the place or person herein described for the property specified and to bring such property or articles, and to summon the owner, or keeper thereof, if any be named in the complaint, if to be found by you, to appear before the District court in the district where such property shall have been seized, namely the _____ Division of the District Court of Rhode Island.

Place or person to be searched: Opposite pole 4510 South County Trail, Charlestown, Rhode Island described as a tan aluminum trailer, approximately 25 feet in length, 2 front gray doors, wooden ramp, wooden stairs, large sign on the roof Narragansett Smoke Shop.

Property or articles to be searched for: Cartons of cigarettes, United States Currency, paperwork items, computers or documents showing ownership of possession or control of the premises.

Name of owner, or keeper, thereof if known to complainant: Matthew Thomas Chief of the Narragansett Indians.

Said warrant shall be served in the daytime — may be

served in the nighttime — within seven (7) days from the issuance hereof, AND IF NOT SERVED WITHIN SAID TIME TO BE RETURNED FORTHWITH TO A JUDGE SITTING IN THE ABOVE NAMED COURT.

Property seized by you hereunder shall be safely kept by you under the direction of the Court so long as may be necessary for the purpose of being used as evidence in any case. As soon as may be thereafter, if the same be subject to forfeiture, such further proceedings shall be had thereon for forfeiture as is prescribed by law.

Hereof fail not and MAKE TRUE RETURN PROMPTLY OF THIS WARRANT TO A JUDGE THERE SITTING with your doings thereon, accompanied by a written inventory of any property taken to a judge sitting in the above named court.

Issued at Crans in the county of Prov. this 12th day of July, A.D. 2003 @9:45p.m..

/s/

Judge of the District Court

RETURN OF SERVICE

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

_____, SC.

At _____ (place), _____ (date) A.D. _____, pursuant to the within warrant I have made search during the — _____ — as commanded and submit herewith a written inventory of property taken:

_____

I have also summoned _____ named in said Complaint, as commanded to appear before the _____ Division of the District Court in _____ at 9:30 o'clock in the forenoon, on _____ A.D. _____.

I have also given to _____ the person from whom — from whose premises said property was taken — a copy of the within warrant — I have left a copy of the within warrant at — on the place from which said property was taken — but

I did not fid the person from whose premises said property was taken but left a copy of said warrant — on the place from which the property was taken.

_____

Authorized Officer

Appendix I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Narragansett Indian Tribe of Rhode Island

Plaintiff,

vs.

The State of Rhode Island and Providence Plantations, Governor Donald L. Carcieri, State of Rhode Island, in his official capacity; Patrick C. Lynch, Rhode Island Attorney General, in his official capacity; Rhode Island State Police; Colonel Steven M. Pare, in his official capacity; Justices of The Rhode Island District and Superior Courts; and the Town of Charlestown; and Charlestown Police Department

C.A. No. 03-

Defendants.

AFFIDAVIT

Now comes Chief Sachem Matthew Thomas of the Narragansett Indian Tribe and state under oath as follows:

1. As the duly elected Chief Sachem of the Narragansett Indian Tribe, I, along with the Tribal Council are duly authorized, as the Tribal Government, to represent the interests of the Narragansett Indian Tribe.

2. That on July 12, 2003, the Narragansett Indian Tribe commenced the sale of cigarette products on the Narragansett Indian Reservation, otherwise known as the Tribe's Settlement Land pursuant to 25 U.S.C. § 1701, et. seq.
3. The revenue generated by the sale of cigarette products is to provide for the economic needs of the Tribe to fund programs such as health care, housing, elder and childcare and education for Tribal members.
4. The Tribal government is responsible for the health, education and welfare of the Tribe and its members.
5. The Tribe will suffer irreparable harm in the event that it does not have funds to finance these governmental services.
6. The Tribe will suffer irreparable harm as a result of the loss of revenue resulting from the actions of the State of Rhode Island in confiscating the Tribe's tobacco inventory and closing the smoke chop.
7. The Narragansett Smoke Shop is a Tribal economic enterprise, established and operated by the Tribal government under the laws of the Narragansett Indian Tribe.
8. The State Search Warrant was never served upon or shown to me. When asked to see a Warrant known shown to me.

/s/_____
Chief Sachem
Matthew Thomas
Narragansett Indian Tribe

Subscribed and sworn before me this 15th day of July 2003.

/s/

John F. Killoy, Jr.
Notary Public
Comm Expires — 7/29/05